# DOCKET

PROCEEDINGS AND ORDERS DATE: 012985

CASE NBR 83-1-06807 CFH
SHORT TITLE Alvord, Gary E. DOCKETED: May 25 1984
VERSUS Wainwright, Sec., FL DOC

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| May 25 1984 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| Jun 25 1984 | Brief of respondent Wainwright, Sec. in opposition filed. |
| Jun 28 1984 | DISTRIBUTED. September 24, 1984 |
| Jul 6 1984 | Reply brief of petitioner Gary E. Alvord filed. |
| Oct 1 1984 | REDISTRIBUTED. October 5, 1984 |
| Oct 18 1984 | REDISTRIBUTED. October 26, 1984 |
| Oct 29 1984 | The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.) |

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1-12-P

# PETITION FOR WRIT OF CERTIORARI

No. 83-6807 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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GARY ELDON ALVORD,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT,

Respondent.



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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER DEFENSE COUNSEL IN A CAPITAL MURDER CASE IS ABSOLVED OF HIS SIXTH AMENDMENT DUTY TO INVESTIGATE AND COUNSEL AN INSANITY DEFENSE WHEN: IT IS THE SOLE VIABLE DEFENSE; THE DEFENDANT HAS OBJECTED TO THE DEFENSE BEFORE INVESTIGATION; AND THE DEFENDANT IS PRESUMED INSANE UNDER THE APPLICABLE LAW?

II. IN A 28 U.S.C. § 2254 HABEAS CORPUS PROCEEDING, WHICH PARTY HAS THE BURDEN OF PROVING WAIVER VEL NON OF A MIRANDA RIGHT WHEN THE RECORD IS SILENT?



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Gary Eldon Alvord, in forma pauperis, by and through undersigned counsel, petitions this Court to issue its Writ of Certiorari to the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The opinion on direct appeal from petitioner's convictions is reported as Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

The opinion of the District Court for the Middle District of Florida is reported as Alvord v. Wainwright, 564 F. Supp. 459 (M.D. Fla. 1983), and is set out as Appendix A hereto.

The opinions of the Eleventh Circuit Court of Appeals are reported as Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984) and the opinion On Petition For Rehearing and Suggestion for Rehearing En Banc is



reported at _____ F.2d _____ (11th Cir. 1984), Eleventh Circuit Court of Appeals No. 83-3345 (April 25, 1984) (Slip Op.), and are set out in Appendices B and C hereto.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on February 10, 1984, and the order On Petition For Rehearing and the Suggestion For Rehearing En Banc was entered on April 25, 1984.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV of the Constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of law; nor deny to any person within its jurisdiction the equal protection of the laws.



## STATEMENT OF THE CASE

Petitioner, Gary Eldon Alvord, is under three death sentences as a result of convictions occuring in 1974 for three counts of first degree murder which had occured in 1973. Petitioner had been in and out of mental hospitals in Michigan since age 13 and has a parental history of mental illness. At the time of the murders he had escaped from the Ionia State Hospital in Michigan. During an earlier escape from the same Michigan mental hospital, petitioner was charged with the kidnap and rape of a ten year-old girl in 1967, and spent more than two years in the mental institution before being declared competent to stand trial. In 1970, he was adjudicated not guilty by reason of insanity and further institutionalized. He escaped and came to Florida, where subsequently he was indicted for the June 1973 murders of three women.

About two weeks after the indictment was returned, Thomas Meyers, Esquire, a part-time public defender in the Circuit Court for Hillsborough County, Florida,was appointed to represent him. Mr. Meyers had tried approximately 15 to 20 felony cases before a jury at the time of his appointment, but had tried none in which an insanity defense was utilized. Petitioner's case was one of the first capital cases tried in that Judicial Circuit under Florida's revised death penalty statute. Mr. Meyers was appointed on three first degree murder cases during the summer and fall of 1973 and was in trial in his first such capital case until Thanksgiving, after being appointed to represent petitioner.

After his appointment Mr. Meyers saw petitioner, his client, at the county jail in September 1973 for about 15 minutes. Petitioner was uncooperative. The prosecutor advised Mr. Meyers that Alvord had suffered from mental problems since an early age, had spent many years in mental institutions and had been adjudicated not guilty by reason of insanity in Michigan. After the first contact with petitioner, Mr. Meyers' subsequent pre-trial contact with him was primarily at court hearings.

In October, 1973, to determine competency to stand trial, the trial court ordered that petitioner be examined by two court-appointed psychiatrists who then attempted to examine him. Petitioner refused to talk to them without his attorney present. In a competency hearing, also in October, 1973, the two appointed doctors were unable to render opinions as to his mental state and suggested that petitioner be sent to a state hospital for observation to allow the proper determination of competency to stand trial. The court ordered petitioner sent to a state hospital for observation and further suggested that his Michigan medical records be obtained. Approximately a month after the ordered commitment for observation, the trial court, without hearing, set aside its commitment order, but it was several weeks later that Mr. Meyers even learned that his client was still incarcerated in the Hillsborough County Jail rather than being transferred to the State hospital for psychiatric observation to determine competency to stand trial.

At the invitation of the state, and without notice to defense counsel, one of petitioner's Michigan doctors, Dr. Robey, came to Florida in January of 1974 and examined petitioner. Mr. Meyers did not know of this examination until a competency hearing at which he was then required to cross examine Dr. Robey who testified that in his opinion Mr. Alvord was competent to stand trial. Dr. Robey also testified that petitioner's mental illness was of the type that would suddenly recur or go into long remissions.

Thereafter the trial court ordered Dr. Robey to perform a further mental examination to determine sanity at the time of the offense. It was Dr. Robey's opinion that under Florida's M'Naghten standard, petitioner was sane at the time of the offense. At the time of petitioner's adjudication of not guilty by reason of insanity, in Michigan, that state applied both M'Naghten and the irresistible impulse tests. At the time of petitioner's trial in Florida on the instant offenses Florida applied the M'Naghten test: whether the defendant understood the nature of the act and that it was wrong at the time of the offense.



Petitioner's medical records show that the psychiatrist who testified at the 1970 Michigan trial considered petitioner unable to distinguish right from wrong, a fact never discovered by Mr. Meyers until after petitioner's trial. Further, Dr. Robey stated while testifying in the District Court evidentiary hearing that he knew from discussions with the testifying doctor that such was the basis of the adjudication. Florida law gave full effect to an adjudication by the court of a foreign state without regard to the foreign state's tests for insanity. Hixon v. State, 165 So.2d 436 (Fla. App. 1964). Accordingly during the relevant time period in his trial proceedings petitioner enjoyed the benefit of a presumption of insanity.

After the finding of competency to stand trial by the trial court in January of 1974 the trial court nevertheless again directed on two occasions that petitioner be further examined by two court-appointed psychiatrists to determine competency to stand trial. After examinations at which petitioner complained of being ignored by his attorney and refused to cooperate in his absence, hearings were held and the court found petitioner competent to stand trial.

Trial was ultimately set for April 1, 1974, and on March 26, 1974, Mr. Meyers filed a Notice of Intent to Claim Insanity as required by Florida law to raise the insanity offense but such notice is inexplicably absent from the trial record. Alvord v. Wainwright, 564 F.Supp. 459 at f.n. 13 at 468 (M.D. Fla. 1983). On the same date Mr. Meyers also filed a motion on behalf of petitioner to transfer him to a state mental hospital for an examination to determine competency to stand trial. Attached to that motion was a copy of the Michigan adjudication of insanity and order of commitment resulting from petitoner's 1970 adjudication of not guilty by reason of insanity. Motion to transfer was denied and trial began on April 1, 1974. After asserting an

uncorroborated alibi defense at which the sole witness was petitioner Alvord, he was convicted of three counts of first degree murder. The trial court sentenced petitioner to death. The convictions and sentences were affirmed by the Florida Supreme Court on direct appeal. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Petitioner moved for reduction of sentence pursuant to Rule 3.800 (b), Fla. R. Crim. P., on November 29, 1976. The motion was denied, and the Supreme Court of Florida denied a petition for mandamus on March 10, 1977 (unreported). Thereafter, petitioner filed a motion for post-conviction relief, pursuant to Rule 3.850, Fla. R. Crim. P., which was denied by a state circuit judge on August 27, 1979, and that denial was affirmed by the Florida Supreme Court on April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla. 1981). Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 which was granted in part and denied in part. Alvord v. State, 564 F.Supp. 459 (M.D. Fla. 1983). On cross appeals the Eleventh Circuit Court of Appeals reversed the portion of the district court order granting relief and affirmed that portion of the order denying relief. A Motion for Rehearing and Rehearing En Banc was denied on April 25, 1984, after vacating and substituting an opinion relating to the Miranda issue raised herein. The Eleventh Circuit Court of Appeals has stayed issuance of the mandate pending this petition for writ of Certiorari by order filed May 3, 1984.

During an interrogation by a law enforcement officer after petitioner's arrest, the followin colloquy took place between the officer and the petitioner:

Q. Okay. And did you, in fact, talk to him?

A. Yes, sir, I did.

Q. Okay. Did you advise him of his rights?

A. Yes, sir, I did.



Q. And what did you tell him regarding his rights?

A. First of all I advised him that, who I was. I advised him who I was and that I was a detective with the Police Department in Lansing. I advised him that he didn't have to talk with me, that anything he said would be used in court against him. I advised him that he had to, he had a right to an attorney. He had a right to have an attorney present before he answered any questions or made any statement.

Q. All right. Did he request to have an attorney?

A. No, sir, he did not.

Q. Did he request to remain silent?

A. No, sir, he did not.

Q. Did you or anyone in your presence promise him anything in order for him to make a statement?

A. No, sir.

Q. Did you or anyone in your presence threaten him to make a statement?

A. No, sir.

Q. Did you promise him immunity if he made a statement?

A. No, sir.

Q. Did you coerce him in any way to make a statement?

A. No, sir.

Q. Did he indicate whether or not he understood his rights?

A. Yes, sir. He told me he was aware of his rights.

Q. All right. And then what did you say to the defendant, Gary Alvord?

A. At this time I advised him that I wanted to talk to him about a safe job.

Q. Okay. What did he say?

A. Just looked at me and said, "I am a rapist, not a God-damn thief."

Q. And what did you say at that point?

A. I said, "What do you mean by that"?

Q. What did he say?

A. He then said,"I am wanted in Florida for three murders."

Q. And what did you say?

A. I said, "I thought it was two."

Q. What did he say?

A. He said, "Maybe they forgot one."

Q. And what did you say to that?

A. I looked at him and said, "Did you do it?"

Q. And what did he respond?

A. He said, "They will have to prove it."

Q. Okay. Anything further regarding the conversation?

The petitioners alleged statements, to the effect that he was a rapist rather than a thief, were introduced against him at trial by the prosecution during its case-in-chief.



I. IN DECIDING THAT COUNSEL IS RELIEVED OF HIS DUTY TO INVESTIGATE AND COUNSEL AN INSANITY DEFENSE BY THE PRE-INVESTIGATION OBJECTIONS OF HIS CLIENT, THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF THE FOURTH CIRCUIT COURT OF APPEALS ON AN IMPORTANT QUESTION OF THE ATTORNEY-CLIENT RELATIONSHIP.

Petitioner requests this Court to consider the question of the responsibility of defense counsel to investigate and counsel an insanity defense when it is the sole viable defense available to a client charged with three capital crimes, and when the client has objected to presenting that defense. Stated another way, the petitioner requests this Court to set forth the responsibility of counsel to assist his client in making an educated strategic choice whether to pursue an insanity defense in a capital murder case when: it is the only viable defense; the client has objected to the defense before the attorney investigated its feasibility; and the client is presumptively insane.

This question was left unanswered by this Court's recent decision in Strickland v. Washington, ___U.S.____, 52 U.S.L.W. 4565 (1984). In that case, this Court concerned itself with the proper standards for assessing counsel's assistance at trial or sentencing in a capital case, in the face of a habeas claim of ineffectiveness. The standards were then applied to the facts of that case. Insanity was never at issue. Here, the issue is the relative roles of counsel and client in the decision as to whether, in a capital case, the only possible defense should be adequately explored. The focus here is sharpened by the fact that the defense is insanity, and that the client's own mental state is in question at the time.

A panel of the Eleventh Circuit ruled that the attorney is ethically bound to accede to the wishes of the presumptively-insane defendant, and is thus relieved of the responsibility of investigating the defense and providing educated counsel against the suicidal inclinations of his client. Alvord v. Wainwright, 725 F.2d 1282, 1288-89 (11th Cir. 1984). In so holding, the

Eleventh Circuit brings itself into irreconcilable conflict with the principles of this Court's decision in Jones v. Barnes, 463 U.S. ____, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and with the Fourth Circuit Court of Appeals case of Brennan v. Blankenship, 472 F.Supp. 149 (W.D. Va. 1979), aff'd mem. 624 F.2d 1093 (4th Cir. 1980). Because of the frequent link between murder and insanity, resolution of this issue will greatly aid in the uniform application of the law in capital cases. Furthermore, a definitive statement by this Court will provide needed direction to defense counsel as to the limits of their responsibility to guide the direction of the insanity defense.

This Court has repeatedly emphasized the fundamental role of counsel in the adversarial process. In Johnson v. Zerbst, 304 U.S. 458 (1937), it was stated:

> The "...right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

Id. at 463, quoting Powell v. Alabama, 287 U.S. 45, 68 (1932) (emphasis added). The right to assistance of counsel would be meaningless if it required no more than simply doing the bidding of the defendant, regardless of the state of mind of the defendant and the stupidity of the action. When



there is a single avenue, effective counsel has an affirmative duty to educate himself and to strongly urge his client to travel down that avenue.

The responsibility of the attorney to conduct the case in his client's behalf was at issue in Jones v. Barnes. There, this Court held that an appellate attorney need not present every non-frivolous issue requested by his client. Underlying its holding was the recognition of the "superior ability of trained counsel in 'the examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf'". 103 S.Ct. at 3312, 77 L.Ed. 2d at 993, quoting Douglas v. California, 372 U.S. 353, 358 (1963). It follows that:

> [B]y promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.

Id. (emphasis added). The decision of the panel below not only constitutes a per se rule that counsel may not raise the insanity defense, though it be the sole defense, against the wishes of his client - the Eleventh Circuit holds that counsel need not even investigate the only defense available if his client rejects it before-hand. This restriction upon the attorney's ability to "present the client's case in accord with counsel's professional evaluation" cannot be reconciled with the principles of Jones v. Barnes, and this Court should grant certiorari to bring this case into harmony with that decision.

The decision below is in clear conflict with Brennan v. Blankenship, 472 F.Supp. 149 (W.D. Va. 1979), aff'd mem., 624 F.2d 1093 (4th Cir. 1980). Brennan was examined by three

psychiatrists. Two found him competent; one, Dr. Scott, found him incompetent and had him committed. Scott also opined that Brennan was legally insane at the time of the commission of the charged offense. Fearing extended commitment in a mental hospital, Brennan rejected a defense of insanity. His attorneys did not press him on the issue and proceeded to trial without the only viable defense available. Brennan was convicted and, on habeas, raised the issue of ineffective assistance of counsel.

The District Court found that "the failure of defense counsel to fully investigate and affirmatively communicate the possibility and impact of raising such pleas" constituted ineffective assistance. Id. at 155. When insanity is clearly the issue, counsel must seek psychiatric assistance and adduce in court evidence of his client's mental condition. Anything less is ineffective assistance. Ibid. Significant here, and directly contrary to the opinion of the panel below, the Brennan court found that Brennan's aversion to the defense did not relieve counsel of the duty to provide informed guidance: "...it can scarcely be said that defense counsel discharged their professional responsibility by allowing their case to be guided simply by the uninformed wish of their client to avoid a long period of mental commitment." Id. at 156.

The Brennan Court explicitly rejected a rule requiring the imposition of the insanity defense regardless of the client's wishes. Id. at 157. Such a rule is not necessary for the resolution of the instant issue. The Brennan Court found only that counsel must develop the defense when it is the only course, and strongly advise the client to accept it, rather than allowing themselves "to be blindly guided by his uninformed direction." Id. Petitioner urges this Court to agree.



The ABA's Standards Relating to The Administration of Criminal Justice provide:

> Part V. CONTROL AND DIRECTION OF LITIGATION
>
> 5.1 Advising the defendant. (a) After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.

Id. at 127 (1974 ed.)(emphasis added). That states the essence of petitioner's claim: effective counsel has a duty to investigate the single available defense in order to adequately advise his client, even if, prior to informed advice by counsel, the defendant rejects that approach.

Though not necessary to the disposition of this issue, it is worthy of note that the ABA Standards further provide:

> 5.2 Control and direction of the case.
> (a) Certain decisions relating to the conduct of the case are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

Ibid. (emphasis added). In Jones v. Barnes, after noting the above-listed three decisions to be made by the defendant, this Court observed that "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." 103 S.Ct. at 3313, n. 6, 77 L.Ed.2d at 994-95, n. 6.

Black's Law Dictionary defines a criminal plea as "[t]he defendant's response to a criminal charge (guilty, not guilty, or nolo contendere)." Id. at 1036 (1979 ed.). Insanity is a defense, not a plea, and thus its investigation is the duty of the attorney when the background of his client and the facts of the charged crime call for it.

The District Court found as a matter of historical fact: 1/

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1/ The evidentiary hearing in this case was held on May 13 and 14, 1982, less than a month after the initial panel opinion was issued in Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982), and before the opinion was vacated by the Eleventh Circuit's order of May 14, 1982, granting rehearing en banc, Washington at 879. This en banc opinion has since been reversed. Strickland v. Washington, ____ U.S.____, (1984). In the Washington panel opinion, the Court determined there was some necessity for a showing of prejudice in effective assistance cases, concluding the standard or prejudice which must be met was a very low one indeed. But for the ineffectiveness, the trial would have been altered in a way helpful to the defendant. 673 F.2d at 902.

After the evidentiary hearing, but before the District Court's ruling, the Court of Appeals changed the above-stated standard when it issued its en banc opinion in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982). The Court there held en banc:

> We decide that petitioner has the burden of persuasion to demonstrate the ineffective assistance created not only 'a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage.' See United States v. Frady, ____ U.S.____, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982).

Id. at 1258. This decision was later reversed by this Court in Strickland v. Washington, ____ U.S.____, (1984), in which the Court devised a new approach to examining the prejudice issue in effective assistance cases.

The Eleventh Circuit had explicitly recognized no standard for a showing of prejudice existed in that circuit at any time prior to the en banc decision in Washington, holding:

> The law of our circuit is as yet unclear as to the precise degree of prejudice that a defendant must demonstrate before he is entitled to habeas corpus relief on grounds that he received ineffective assistance of counsel, although it is clear that some degree of prejudice must be shown.

Washington v. Watkins, 655 F.2d 1346, 1362 (5th Cir. 1982).



The record reveals that Mr. Meyers did very little independent investigation of Alvord's potential insanity defense. He obtained only a small portion of his client's voluminous medical record, and made no effort to have even that small part interpreted by a qualified psychiatrist. Meyers Depo. at 29, 42-43. He made no effort to contact anyone in Michigan, where Alvord spent 25 of his 26 years; specifically, he never contacted the doctors who had treated his client at the Ionia State Hospital. Id. at 57. After Alvord refused for the first time to speak to the two court-appointed psychiatrists, counsel chose not to be present at the several subsequent examinations, even though he knew that Alvord's uncooperativeness was on the stated ground that his attorney was not present. He also made no effort until a few days before trial to seek reconsideration of the trial court's ex parte December 6, 1973 order vacating the order of commitment. In the absence of an independent investigation, counsel neither explored the helpful facts and opinions to which Dr. Robey might have testified nor brought out the substantial qualifications that the doctor himself placed on his opinion that Alvord was sane at the time of the offense. In short, Mr. Meyers undertook virtually no investigation of the one defense he considered viable in Alvord's case, choosing instead to comply with Alvord's request that he put petitioner on the stand and proceed with an alibi defense.

Alvord v. Wainwright, 564 F.Supp. 459, 470-71 (M.D. Fla. 1983). The Court concluded, though, that Alvord's objections absolved counsel of his duty to investigate. Id. at 473-74. The Eleventh Circuit agreed. This Court should address this attack on the principle of the "guiding hand of counsel". Here counsel merely accepted Alvord's desire to rely on what the Eleventh Circuit characterized as "an admittedly weak, unsupported alibi." 725 F.2d at 1288. The Eleventh Circuit found that Alvord's uninformed wish relieved counsel of the basic duty to investigate the single viable defense available. Contrary to the Court's holding, this is an utter abdication of the duty to guide.

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1/ cont. In light of the recent substantial change in the law, and the extent to which the prejudice standard was made more difficult to meet after the evidentiary hearing, this cause should be remanded for an evidentiary hearing on the specific issue of the extent to which Mr. Alvord was prejudiced by his counsel's ineffectiveness at his sentencing hearing. Smith v. Yeager, 393 U.S. 122 (1968); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

The decision below reduces counsel to little more than a puppet who must respond unquestioningly to the uninformed wish of his schizophrenic client.

Meyers failed to build a rapport with petitioner sufficient to convince petitioner to accept his attorney's professional evaluation of the case. Petitioner had successfully presented an insanity defense in Michigan. Dr. Robey, who was treating the petitioner at the time, testified at the evidentiary hearing as to the difference in the counsel received by petitioner then:

> Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.

This contrasts sharply with Meyers' efforts. In three months of representation in this triple murder case, Meyers saw petitioner three times before petitioner was found competent: once, for less than fifteen minutes; next a few weeks later, in court during a competency hearing; finally several months later, at the hearing at which the petitioner was declared competent. Meanwhile, petitioner was in jail, under suicide watch: no lights, in his cell, no furniture except a mattress, no blanket, and he was kept totally naked. Ignored by his attorney, petitioner tried to force his visit by refusing to talk to the psychiatrist without his attorney present. Meyers was aware of this. He never attended. He never attempted to subpoena Alvord's mental records. Thus, no defense was developed.



Instead of building a relationship on trust, as did Alvord's attorney in Michigan, Meyers maintained his relationship with Alvord by sacrificing good legal judgment to his client's unreasoned prejudices against presenting evidence of his own mental disorder. Meyers never effectively counseled Alvord. He failed to educate himself and work assiduously to bring Alvord around to accept his only defense. When it became apparent Meyers could not convince petitioner to consider his only defense, he should have withdrawn when so instructed by the trial court [Tr. Rec. at 171-72], in favor of someone who could.

Meyers' failure to provide educated guidance to his presumptively-insane client deprived Alvord of his Sixth Amendment right to effective counsel, and his Fourteenth Amendment right to a fair trial and the panel's decision to the contrary conflicts with the position of this Court, and of the Fourth Circuit. There is a reasonable probability that effective counsel would have altered the result of the proceeding. For example, investigation would have revealed that the petitioner had previously been acquitted in Michigan through the testimony of a Dr. Yoder, who opined that petitioner was insane under the M'Naghten Rule--the same test applied in Florida. [Tr. Rec. at 1156] 2/ The omission of the sole strong defense undermines the reliability of the result reached. Strickland v. Washington. Resolution of this important issue will aid defense counsel in the proper performance of their duties. The need for counsel to know the requirements of their role takes on added significance when failure to meet those requirements results in imposition of the death penalty. This Court should grant certiorari on this issue.

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2/ See Appendix D.

II. THE CIRCUIT COURTS OF APPEAL ARE IN DIRECT CONFLICT ON THE ISSUE OF THE ALLOCATION OF THE BURDEN OF PROOF OF WAIVER VEL NON OF A MIRANDA RIGHT WHEN THE RECORD IS SILENT.

The petitioner requests this Court to grant certiorari to decide which party in a federal habeas corpus proceeding has the burden of proving waiver vel non of a fundamental Constitutional right when the record is silent. The Eleventh Circuit, on rehearing, squarely held that that burden falls on the petitioner. This decision is in direct conflict with Fifth Circuit cases binding on the panel below, 3/ and with the decisions of several other circuits. This is an important question of Constitutional law, and of great consequence in habeas proceedings. This Court has not addressed the issue since Johnson v. Zerbst, 304 U.S. 458 (1937). It is time for an authoritative statement by this Court, to resolve the confusion among the circuits spawned by the Eleventh Circuit's decision.

The petitioner contends that during a custodial interrogation, he was not warned of his right to appointed counsel before highly prejudicial statements were elicited from him, and thus, pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), those statements should not have been admitted against him at trial. In its original opinion, the Eleventh Circuit found that the petitioner's case was indistinguishable from Michigan v. Tucker, 417 U.S. 433 (1974). Citing Michigan v. Tucker for the proposition that failure to advise an accused of the right to appointed counsel does not render resulting statements inadmissible, the court rejected petitioner's argument. Alvord v. Wainwright, 725 F.2d 1282, 1298-99 (11th Cir. 1984).

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3 / Under the reasoning of Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)(en banc), decisions of the Fifth Circuit, as handed down on or before September 30, 1981, are binding as precedent on all federal courts within the Eleventh Circuit.



The issue in Tucker was not whether the failure of a Miranda warning to include notice of the right to appointed counsel rendered a post-Miranda custodial statement inadmissible. It was whether Miranda should be applied retroactively to require the exclusion of derivative evidence flowing from a pre-Miranda custodial statement made after a warning which had that deficiency. In Tucker, this Court explicitly said that the failure to warn of the right to counsel was "a disregard...of the procedural rules later established in Miranda," and that post-Miranda "statements taken in disregard of the Miranda principles must not be used to prove the prosecution's case at trial, Id. at 445. Moreover, the Supreme Court in Clark v. Smith, 403 U.S. 946 (1971) (per curiam), reversing 224 Ga. 766, 164 S.E. 2d 790 (1968), reversed on remand, 228 Ga. 205, 184 S.E. 2d 822 (1971), squarely held that the omission of the right to appointed counsel from a Miranda warning does render a defendant's subsequent confession inadmissible. See also, Harris v. New York, 401 U.S. 222 (1971), where this Court held that though statements gained without notice of right to appointed counsel were inadmissible in the prosecution's case-in-chief, they could be used for impeachment. 401 U.S. at 224.

On rehearing, the Eleventh Circuit vacated the pertinent part of its opinion on the Miranda issue. It termed Michigan v. Tucker "unclear" and refused to rely on it. Slip Op. at 2, n. 22 (a). The Court concluded instead that the petitioner had "failed to meet his burden of proving that he did not receive the proper warnings." Slip Op. at 8 (emphasis in original). The Court thus shifted the burden of proof of waiver of a fundamental right, based on a silent record, to the petitioner. The opinion is at odds with applicable law, flies in the face of Miranda, and throws the law of habeas procedure into a state of confusion. This Court should grant certiorari to correct the panel's error.

Although, as a general rule, the burden of proof in a habeas proceeding is on the petitioner, see, e.g., Hill v. Linahan, 697 F.2d 1032, 1036 (11th Cir. 1983), the inquiry does not end there. Under the facts of this case, the panel's conclusion constitutes an impermissible shift of the burden of proof of the voluntariness of his statements to Alvord.

It is well-settled that as a predicate to admission of post-arrest statements of the accused, the prosecution must demonstrate that the Miranda warnings were properly given. Miranda at 479. The prosecution has "a heavy burden" to demonstrate a knowing and intelligent waiver of Fifth and Sixth Amendment rights. Id. at 475. The Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

Thus, it is beyond dispute that the prosecution must make an affirmative showing that the accused was made fully aware of his rights before post-arrest statements may be introduced against him:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Miranda at 475, quoting Carnley v. Cochran, 396 U.S. 506, 516 (1962).

There is no evidence that petitioner was given notice of his right to appointed counsel, before his statements were elicited. There is no evidence that he waived that right. Clark v. Smith. When the record is silent on the issue of waiver, the state has the burden in federal habeas corpus proceedings of demonstrating "a willing waiver of legal counsel". The contrary conclusion of the Eleventh Circuit Court is in sharp conflict with the following decisions of other circuits: Ford v. Wainwright, 526 F.2d 919, 921-22 (5th Cir. 1976); Potts v. Estelle, 529 F.2d 450, 455 (5th Cir. 1976); Williford v.



Estelle, 672 F.2d 552, 555 (5th Cir. 1982); Moore v. Ballone, 658 F.2d 218, 228 (4th Cir. 1981); Losieau v. Sigler, 406 F.2d 795 (8th Cir. 1969), cert. denied, 396 U.S. 933 (1969). Here, there is no evidence that Alvord was aware of his right to appointed counsel. The record is silent on the issue. The state failed to demonstrate at trial or at the habeas evidentiary hearing that Alvord knew of his right to appointed counsel, and thus failed to carry its heavy burden of rebutting the presumption against waiver of this fundamental right.

Johnson v. Zerbst does not lessen the force of this conclusion. Although language contained therein lends some support to the panel's allocation of the burden of proof, it is no longer good law. Succeeding cases have strengthened the presumption against waiver of the right to counsel, and have modified Johnson v. Zerbst. Carnley v. Cochran, quoted above, effectively overrules the Johnson v. Zerbst burden of proof dicta. Similarly, in Burgett v. Texas, 389 U.S. 109 (1967), this Court reviewed on certiorari a conviction resulting from a trial in which the defendant's prior convictions were introduced under the state's recidivist statute. Burgett argued the prior convictions were invalid because uncounselled. The Burgett court agreed, reaffirming the proposition that the validity of the prior convictions could not be presumed from a silent record, and held that a conviction is presumptively void when the record fails to indicate that the petitioner had been represented by counsel at trial or that he had waived his right to counsel. Id. at 114-15. See, Mitchell v. United States, 482 F.2d 289, 295-96 (5th Cir. 1973), for a careful analysis of this issue.

By simply relying on a general principle of habeas corpus procedure and ignoring the well-established law of waiver of Miranda rights, the Eleventh Circuit improperly shifted the

burden of proof on this issue to Alvord. Its disposition of this issue contravenes Miranda and its progeny, and erroneously approves the introduction at trial of Alvord's highly prejudicial post-arrest statements. The petitioner urges this Court to grant certiorari on this issue, to bring uniformity among the Circuit Courts on this unsettled area of constitutional law and habeas corpus procedure.



## CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Circuit Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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tional joint venture. Because of the special nature of the assets involved here, I will not direct liquidation, that is, the immediate sale of the Buddhas. Instead, this court sitting in equity directs the following equitable, albeit unconventional, distribution of the Buddhas, a distribution based upon the terms of the agreement specifying that the profits be divided equally after each party receives a return on his or her investment.

Bernice is declared the owner of the Seated and Standing Buddhas and Julian of the Princely and Elongated Buddhas. Wolff's testimony on the current market values is credited, to the effect that the Standing and Seated Buddhas are worth $300,000 and $100,000 respectively, and the Princely and Elongated Buddhas $350,000 each.

Bernice paid $160,000, the purchase price of the first two Buddhas, and $34,000 in expenses. Julian paid $21,000 in expenses. Therefore, the total cost of the Standing and Seated Buddhas was $215,000. The current value of the two minus cost yields a profit of $185,000. Bernice, who will keep the Seated and Standing Buddhas, owes Julian one-half the profit plus the amount of his contribution, or $113,500.

With respect to the Princely and Elongated Buddhas, Bernice contributed $148,400 to the purchase price and Julian, $100,000 to the purchase price and $46,000 in expenses. The current value of the two minus cost yields a profit of $405,600. Julian, who keeps the Princely and Elongated Buddhas, therefore owes Bernice one-half the profit plus the amount of her contribution, or $351,200. On a net basis, Bernice is entitled to a money judgment of $237,700 in connection with the termination of the joint venture, with interest from the date of entry of the judgment.

Settle judgment on notice in ten (10) days.

IT IS SO ORDERED.

KEY NUMBER SYSTEM

**Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Petitioner,**

v.

**Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.**

**No. 81-366 Civ-T-BK.**

United States District Court, M.D. Florida, Tampa Division.

March 23, 1983.

On Motion to Alter or Amend Judgment May 5, 1983.

State prisoner petitioned for writ of habeas corpus attacking his conviction and sentence. The District Court, Krentzman, Senior Judge, held that: (1) petitioner was not denied effective assistance when trial counsel rejected uninvestigated insanity defense in favor of petitioner's uncorroborated alibi; (2) appellate counsel was not ineffective for failure to anticipate subsequent United States Supreme Court decision, and to argue on appeal trial court's error in allowing court-appointed psychiatrist to testify at sentencing hearing as to petitioner's mental condition on basis of examination made without notice to defense counsel; (3) petitioner's death sentence could not stand because it could not be concluded from placement of trial judge's finding of future dangerousness that such nonstatutory finding was not considered in imposing death sentence; and (4) sentencing jury was not impermissibly precluded from considering mitigating circumstances other than those listed in statute.

Ordered accordingly.

**1. Habeas Corpus ⇐85.1(3)**

Conclusion of state court that petitioner received effective assistance of counsel is not to be presumed correct relative to petition for writ of habeas corpus attacking state conviction on that ground. 28 U.S.C.A. § 2254(d).

**2. Criminal Law ⇐641.13(1)**

Whether counsel rendered effective assistance is mixed question of law and fact, requiring district court to apply Sixth Amendment principles to historical facts of case. U.S.C.A. Const.Amend. 6.

**3. Criminal Law ⇐641.13(1)**

Whether counsel was retained or appointed, Sixth Amendment guarantees to criminal defendants effective assistance of counsel, that is, an attorney reasonably likely to render and rendering reasonably effective assistance given totality of circumstances. U.S.C.A. Const.Amend. 6.

**4. Habeas Corpus ⇐85.5(11)**

In order to succeed on claim of ineffective assistance of counsel, federal habeas petitioner must prove his entitlement to relief by preponderance of evidence. 28 U.S.C.A. § 2254(d); U.S.C.A. Const.Amend. 6.

**5. Criminal Law ⇐641.13(5)**

Constitutionally effective counsel must conduct a reasonable amount of pretrial investigation; standard governing amount of pretrial investigation that is reasonable cannot be articulated with precision, for it necessarily depends upon variety of factors including number of issues in case, relative complexity of those issues, strength of government's case and overall strategy of trial counsel. U.S.C.A. Const.Amend. 6.

**6. Criminal Law ⇐641.13(1)**

Reasonableness of counsel's assistance must be judged from perspective of counsel, taking into account all circumstances of case, but only as those circumstances were known to him at time in question. U.S.C.A. Const.Amend. 6.

**7. Criminal Law ⇐641.13(2)**

Petitioner was not denied effective assistance of counsel when trial counsel rejected uninvestigated insanity defense in favor of petitioner's uncorroborated alibi, even though had he chosen to do so, counsel could easily have raised presumption of incompetence and insanity available to petitioner by virtue of prior adjudication in another state, where petitioner stated repeatedly that he was unwilling to assert defense of insanity at all, and where psychiatrist who had treated petitioner for several years opined that petitioner was sane at time of offense. U.S.C.A. Const.Amend. 6.

**8. Criminal Law ⇐641.13(2)**

Sixth Amendment requires that defense counsel do more than simply obey possibly pathological wishes of an accused; counsel must, however, take those wishes into account when deciding whether to raise insanity defense. U.S.C.A. Const.Amend. 6.

**9. Criminal Law ⇐641.13(7)**

One accused of capital crime has Sixth Amendment right to effective assistance of counsel at penalty phase as well as during certain pretrial proceedings and at trial itself. U.S.C.A. Const.Amend. 6.

**10. Criminal Law ⇐641.13(7)**

Essentially same standard applies when assessing counsel's performance at sentencing hearing as applies in gauging his effectiveness at trial, that of reasonably effective assistance. U.S.C.A. Const.Amend. 6.

**11. Criminal Law ⇐641.13(1)**

Constitution does not require errorless counsel, and although its requirements are theoretically no more strict in capital cases than in other criminal cases, seriousness of charges against defendant is factor that must be considered in assessing counsel's performance. U.S.C.A. Const.Amend. 6.

**12. Criminal Law ⇐641.13(7)**

Trial counsel may have rendered constitutionally deficient representation at sentencing phase by failing to undertake reasonable investigation into petitioner's psychiatric history; however, petitioner did not offer any evidence of psychiatric testimony that might have been revealed upon more thorough investigation, and thus petitioner suffered no actual or substantial disadvantage in course of sentencing hearing legally cognizable as ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

**13. Criminal Law ⇐641.13(6)**

An attorney's responsibility to make an independent investigation is discharged by his client's lack of communication with potential witnesses. U.S.C.A. Const.Amend. 6.

**14. Habeas Corpus ⇐85.4(1)**

A federal habeas petitioner must demonstrate his entitlement to relief by preponderance of evidence. 28 U.S.C.A. § 2254(d).

**15. Criminal Law ⇐641.13(7)**

Appellate counsel ordinarily need not assert, on a properly perfected appeal, grounds that he reasonably considers meritless. U.S.C.A. Const.Amend. 6.

**16. Criminal Law ⇐641.13(7)**

Record supported finding that petitioner ultimately consented to being represented at trial by public defender; therefore, appellate counsel was not ineffective for failing to raise trial court's failure to remove public defender as defense counsel. U.S.C.A. Const.Amend. 6.

**17. Criminal Law ⇐641.13(7)**

Trial court had neither procedural nor constitutional responsibility to instruct sua sponte on continued presumption of insanity following defendant's insanity adjudication in another state; therefore, appellate counsel was not ineffective by failing to raise trial court's failure to so instruct. U.S.C.A. Const.Amend. 6.

**18. Criminal Law ⇐330**

No matter how a state designs its presumptions on issue, insanity remains an affirmative defense unless sanity of accused is expressly defined as part of crime charged.

**19. Criminal Law ⇐625**

Competency to stand trial is an issue distinct from substantive defense of insanity; trial court must always consider competency of defendant to stand trial, but need not raise sua sponte any substantive defense that defendant does not assert.

**20. Criminal Law ⇐641.13(7)**

Appellate counsel did not provide ineffective assistance by failing to raise trial court's alleged error in setting aside, after consulting with state agency officials, order committing petitioner to state mental hospital for observation, because appellate counsel faced an issue only arguably preserved for appeal and of dubious legal merit. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.210.

**21. Mental Health ⇐432**

One is legally incompetent to stand trial when he lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as a factual understanding of proceedings against him.

**22. Criminal Law ⇐641.13(7)**

Failure of appellate counsel to anticipate future United States Supreme Court decision providing, inter alia, that introduction of court-appointed psychiatrist's testimony to prove capital defendant's future dangerousness violates rule of *Miranda* did not constitute ineffective assistance of counsel, because trial counsel failed to object to psychiatrist's arguably violative testimony that petitioner would be dangerous to women in future and that he was sane at time of crimes in question, and because issue would not necessarily have succeeded on appeal. U.S.C.A. Const.Amends. 5, 6, 14.

**23. Criminal Law ⇐641.13(7)**

Trial court took considerable care to ensure that psychiatrist testified only to matters surrounding petitioner's prior crimes in Michigan of which he had knowledge independent of communications from petitioner; therefore, information conveyed by psychiatrist was not within Florida's psychiatrist-patient privilege, and appellate counsel was not ineffective for failing to so argue on direct appeal. F.S.1973, § 90.242; U.S.C.A. Const.Amend. 6.

**24. Criminal Law ⇐641.13(7)**

Failure of appellate counsel, following testimony by court-appointed psychiatrist relative to petitioner's prior crimes in Michigan, to raise on direct appeal argument that any statements obtained from petitioner by psychiatrist could be used as evidence



of mental condition but not as evidence of their factual truth, was a reasonable tactic and thus did not constitute ineffective assistance, where record reflected care of trial judge in admitting psychiatrist's testimony on Michigan crimes to facts he knew from sources other than petitioner's statements, and where psychiatrist did not com to know petitioner's criminal record in course of custodial examination he made of petitioner. U.S.C.A. Const.Amend. 6.

**25. Criminal Law ⇐641.13(7)**

Appellate counsel did not render ineffective assistance in choosing not to raise at time of appeal issue of whether introduction of evidence relating to petitioner's prior crimes in Michigan violated Flori a capital sentence statute as not within statutory aggravating circumstance requiring conviction of prior capital felony or felony "involving the use or threat of violence to the person," because evidence may have been relevant to rebut statutory mitigating factor relative to defendant's significant history of prior criminal activity, or to rebut two mitigating factors concerning mental state. U.S.C.A. Const.Amend. 6; West's F.S.A. § 921.141(6)(a, b, f).

**26. Criminal Law ⇐641.13(7)**

Evidence relating to Michigan kidnapping and rape of which petitioner was found not guilty by reason of insanity should have been excluded from subsequent criminal trial in Florida; however, appellate counsel acted reasonably in not raising issue on appeal because trial court did not find aggravating circumstance of prior violent felony conviction, and was supported in his failure to find mitigating "no significant history of prior criminal activity" by evidence of prior misdemeanors. U.S.C.A. Const.Amend. 6; West's F.S.A. § 921.-141(5)(b).

**27. Costs ⇐302.2(2)**

Indigent defendants are and thus must be entitled to assistance of an expert when such is necessary to their defense.

**28. Mental Health ⇐434**

Under appropriate circumstances, defendant must be provided psychiatric examination when such is necessary to reasonable investigation of insanity defense.

**29. Mental Health ⇐435**

Trial court was not constitutionally required to commit petitioner for observation in order to facilitate development and presentation of insanity defense, where two psychiatrists had tried unsuccessfully to examine petitioner and had suggested commitment, but a third, thoroughly qualified psychiatrist, one whom petitioner trusted and who possessed intimate knowledge of his psychiatric history, concluded that petitioner was sane at time of offense, even though he subsequently stated that his examinations of petitioner were made under adverse circumstances.

**30. Criminal Law ⇐1208(1)**

Practice of Florida Supreme Court of requesting and receiving information concerning capital defendants not presented at trial and not part of trial record or record on appeal is not unconstitutional.

**31. Criminal Law ⇐412.2(4)**

Introduction of arresting officer's testimony concerning petitioner's postarrest statement that, "I'm a rapist, not a * * * thief," did not violate *Miranda*, where officer testified that he told petitioner he was a police officer, that he did not have to say anything, that anything he said could later be used against him, and that he had a right to have an attorney, and that petitioner made statement upon being questioned about another matter. U.S.C.A. Const. Amends. 5, 6.

**32. Habeas Corpus ⇐92(1)**

It was not necessary for district court to undertake case-by-case comparison of past Florida capital sentence appeals to determine whether habeas petitioner's death sentence was consistent with those decisions; rather, court needed only conclude that Florida statutory capital sentence procedure was facially constitutional and was followed in petitioner's case.

**33. Jury ⇐108**

Trial court erred in refusing to excuse for cause venireman who stated his view at voir dire that any person convicted of first-degree murder should be sentenced to die; however, record reflected and petitioner conceded that he did not exhaust his peremptory challenges in later excusing that juror peremptorily, and therefore petitioner was in no way prejudiced by trial court's error.

**34. Jury ⇐108**

Venireman who believed that death penalty should automatically and in every case flow from conviction of first-degree murder must be excused.

**35. Habeas Corpus ⇐30(3)**

Even if not arguably waived by trial counsel's failure to raise claim that petitioner's sentence was unconstitutional because none of the aggravating circumstances found to support that sentence was alleged in indictment, petitioner was not entitled to habeas corpus relief on that basis, in view of absence of authority holding that such enumeration of aggravating circumstances is required, plus consideration of limited number of aggravating circumstances available to prosecution in Florida. West's F.S.A. § 921.141(5).

**36. Criminal Law ⇐1208(1)**

Jury was properly instructed that aggravating circumstances used to support death sentence must be found to exist beyond reasonable doubt.

**37. Criminal Law ⇐1177**

It could not be concluded from trial judge's finding of petitioner's potential for future dangerousness, which comprised concluding sentence of order, and which is not a statutory aggravating factor in Florida, that such nonstatutory finding was not considered in imposing death sentence, and therefore petitioner's sentence could not stand. West's F.S.A. § 921.141(5).

**38. Criminal Law ⇐1206(1), 1208(1)**

Death penalty cannot constitutionally be imposed on basis of statute or instructions that prevent sentencer from considering nonstatutory mitigating circumstances, or by instructions that limit sentencer's consideration of that evidence except as if related to statutory mitigating factors.

**39. Criminal Law ⇐1208(1)**

Sentencing jury was not impermissibly precluded from considering mitigating circumstances other than statutory mitigating circumstances; trial court's omission of word "only" in listing of mitigating circumstances indicated to jury that they might consider factors other than those listed, instructions included list of all statutory mitigating factors and did not limit jury to considering only those listed, petitioner was permitted to introduce evidence freely without limitation to that relevant to a statutory mitigating factor, and sentencing judge's order referred to "any" circumstances which would mitigate sentence in case.

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William J. Sheppard, Sheppard & Caruthers, P.A., Jacksonville, Fla., for petitioner.

James C. Smith, Atty. Gen., Carolyn Snurkowski, Asst. Atty. Gen., Tallahassee, Fla., Charles Corces, Jr., Asst. Atty. Gen., Tampa, Fla., for respondent.

MEMORANDUM OPINION

KRENTZMAN, Senior District Judge.

Gary Eldon Alvord, a Florida state prisoner under sentence of death for a triple murder, petitions this Court for a writ of habeas corpus, 28 U.S.C. § 2254, attacking his conviction and sentence on numerous grounds.

In 1970, petitioner was tried for kidnapping and rape in Michigan, found not guilty by reason of insanity, and committed to the custody of the Michigan Department of Mental Health. In January 1973, Alvord escaped from Michigan's Ionia State Hospital and eventually came to Tampa, Florida. He was indicted on August 1, 1973 for the June 1973 murders of three women, and Thomas Meyers, Esquire, a part-time public defender in the Circuit Court for Hillsborough County, was appointed to represent



him. The trial court found Alvord competent to stand trial. Alvord plead not guilty and took the stand at trial to present an unsupported alibi defense. The state presented circumstantial evidence, a statement made by Alvord upon his arrest, and the testimony of Alvord's girlfriend, to whom he had allegedly confessed the crimes. Petitioner was convicted on all three counts of first degree murder on April 4, 1974. Later that day, the court held the sentencing phase, at which Dr. Ames Robey, a psychiatrist who had treated Alvord in Michigan, was the only witness. The jury returned an advisory sentence recommending the death penalty, and the judge sentenced Alvord to death.

The conviction and sentence were affirmed by the Florida Supreme Court on direct appeal. *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Petitioner's motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P., was denied by a state circuit judge on August 27, 1979,[1] and that denial was affirmed by the Florida Supreme Court on April 9, 1981. *Alvord v. State*, 396 So.2d 184 (Fla.1981). Petitioner was scheduled to be executed on May 6, 1981.

Alvord petitioned this Court for habeas corpus and moved to stay his execution on April 21, 1981. The state's response was, and for the most part remains, that petitioner received a full and fair hearing in the state courts, and that the state court findings and conclusions must be presumed correct under section 2254(d), 28 U.S.C. This Court stayed petitioner's execution and denied the state's motion for judgment on the pleadings. Petitioner's motion for discovery on the issues of ineffective assistance of counsel and inadequate psychiatric examination was granted, and the Court conducted an evidentiary hearing on those two grounds on May 13 and 14, 1982. Depositions of Drs. Sprehe and Gonzalez were received in evidence, and Dr. Robey, trial counsel Thomas Meyers, and appellate counsel Richard Seymour each testified at the hearing. The parties submitted pre-hearing, post-hearing, and final memoranda.

Alvord bases his petition on twelve grounds. Two of those grounds raise issues that have for some time been pending in the courts of appeals. On April 28, 1982, the Eleventh Circuit ordered rehearing en banc in *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982), the case presenting as an issue the constitutionality of the Florida Supreme Court's review of nonrecord material in the course of considering capital appeals. The decision of the en banc court was released on January 7, 1983. 696 F.2d 804 (11th Cir.1983). Also, on May 14, 1982, Unit B of the former Fifth Circuit ordered rehearing en banc in *Washington v. Strickland*, 673 F.2d 879 (5th Cir. Unit B), *rehearing granted*, 679 F.2d 23 (5th Cir. Unit B 1982), a case presenting important issues underlying the claim of ineffective assistance of counsel asserted by petitioner herein.[2] The decision of the en banc court in *Washington* was rendered on December 23, 1982. 693 F.2d 1243 (5th Cir.1982). Resolution of this petition while *Ford* and *Washington v. Strickland* were pending would have been premature.

## I. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. *Representation at Trial*

[1, 2] Petitioner raised his ineffective assistance claim on state collateral review pursuant to Rule 3.850, Fla.R.Crim.P. In denying petitioner's motion, the state court made certain findings of historical fact which this Court generally presumes correct, 28 U.S.C. § 2254(d), but the conclusion of the state court that petitioner received

1. Petitioner first moved for reduction of sentence pursuant to Rule 3.800(b), Fla.R.Crim.P., on November 29, 1976. The motion was denied, and the Supreme Court of Florida denied a petition for mandamus on March 10, 1977 (unreported).

2. Decisions of Unit B of the former Fifth Circuit bind this Court. *County of Monroe v. Department of Labor*, 690 F.2d 1359 (11th Cir. 1982); *Stein v. Reynolds Security*, 667 F.2d 33 (11th Cir.1982).

effective assistance of counsel is not to be presumed correct under 2254(d). Whether counsel has rendered effective assistance is a mixed question of law and fact, requiring this Court to apply sixth amendment principles to the historical facts of the case. *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); *Cuyler v. Sullivan*, 446 U.S. 335, 341–42, 100 S.Ct. 1708, 1714–15, 64 L.Ed.2d 333 (1980); *Sullivan v. Wainwright*, 695 F.2d 1306, 1308 (11th Cir. 1983); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir.1982); *Harris v. Oliver*, 645 F.2d 327, 330 (5th Cir.1981).

The state court found, in addition to the facts recited above, that petitioner's trial counsel, Mr. Meyers, "was aware of [Alvord's] adjudication of insanity and that [Alvord] was presumed to remain incompetent until adjudicated otherwise." *State v. Alvord*, No. 73–1398 (Cir.Ct. August 27, 1979) (order denying post-conviction relief) (hereafter, Rule 3.850 Order).[3] The collateral review court also found that Mr. Meyers moved the trial court on several occasions to appoint Drs. Sprehe and Gonzalez to examine his client and that counsel tried in vain to persuade Alvord to cooperate. Alvord did not want to raise the insanity defense, however, and refused to cooperate each time the doctors were appointed to examine him. Finally, the court stated that "no proof of [Alvord's] prior adjudication was ever submitted to the Court and no such defense was raised." Rule 3.850 Order at 10. This Court presumes correct each factual finding made by the state court, with the single exception of its finding that no proof of the Michigan adjudication was submitted to the trial court.[4] Nevertheless, additional facts not inconsistent with the state court's findings are relevant to petitioner's sixth amendment claim.

1. *Background and Trial.*

Petitioner was in and out of mental hospitals in Michigan since the age of 13; his mother also suffered from mental illness. He was charged with the kidnapping and rape of a ten-year-old girl in 1967, and spent more than two years in a mental institution before being declared competent to stand trial. In 1970, he was adjudicated not guilty by reason of insanity by a Michigan judge after a bench trial.[5] Alvord was institutionalized and, in January 1973, he escaped from the Ionia State Hospital in Michigan. The murders were committed in Florida in June 1973, and Alvord was indicted on August 1, 1973.

Mr. Meyers was appointed to represent petitioner about two weeks after the indictment was returned.[6] Mr. Meyers had tried some fifteen or twenty felony cases to a jury at the time of his appointment, but he had tried none in which an insanity defense was raised. Meyers Depo. at 69. This was one of the first capital cases tried in the Thirteenth Judicial Circuit under Florida's revised death penalty statute. Mr. Meyers was assigned three first degree murder cases during 1973, and was in trial on his first such case in the fall of that year. The attorney first saw his client in September 1973 for about fifteen minutes. Alvord refused to talk to counsel other than to ask him to collect all the evidence he could and to come back. Meyers Depo. at 11. Mr. Meyers learned from the prosecutor that Alvord had suffered from mental problems since an early age, had spent many years in mental institutions, and had been adjudicated not guilty by reason of insanity in Michigan. Meyers' subsequent pre-trial contact with his apparently uncooperative client was primarily at court hearings.

In early October, Mr. Meyers moved off the record for a mental examination of his client. *See* Trial Rec. at 164, 227. *But see* Trial Rec. at 4 (order to determine mental condition of defendant).[7] On October 9, 1973, the trial court directed that Alvord be examined by two court-appointed psychiatrists, Drs. Sprehe and Gonzalez. Both doctors attempted to examine Alvord, but he refused to talk to them without his attorney present. At a competency hearing on October 12, 1973, the doctors described Alvord's response, but could give no opinions as to his mental state. Trial Rec. at 129–32. Mr. Meyers informed the doctors and the court of Alvord's six-year history in mental institutions whereupon both Doctor Gonzalez and the prosecutor stated that in similar cases in Florida the defendant was sent to a state hospital for observation. The court continued the hearing until October 19, 1973, when it stated that the prosecutor had suggested the defendant be sent to the state hospital for observation and that his Michigan records be obtained. Trial Rec. at 133–35. The prosecutor had also mentioned Dr. Robey as a psychiatrist who had treated Alvord for several years in Michigan.[8] The hearing was continued until November 2, 1973, when the court announced its order committing Alvord to the Florida State Hospital for observation and examination. Trial Rec. at 136–37; *see* Trial Rec. at 10 (Order of Commitment). A month later, on December 6, 1973, the court set aside its commitment order without a hearing, having been told by the state hospital that the court had no authority to commit Alvord for observation. Trial Rec. at 14 (Order Setting Aside Commitment); *see* Trial Rec. at 140. About the middle of December, Mr. Meyers learned from the prosecutor that Alvord had not gone to the mental hospital. He did not move to have his client committed for observation until March 26, 1974, a few days before trial.

At the invitation of the state,[9] Dr. Robey came to Florida on January 3, 1974 to examine Alvord. It was the doctor's understanding that the court and both counsel had requested the examination. Trial Rec. at 161–63. Alvord was surprised to see Dr. Robey, complained that he had not seen his attorney for three months, and talked to the doctor for several hours. On January 5, 1974, the court had a hearing at which Mr. Meyers learned for the first time that Dr. Robey had examined his client. Trial Rec. at 138–74; Meyers Depo. at 30–31. Meyers objected to the lack of notice, Trial Rec. at

3. The Rule 3.850 Order appears in Volume Six of Respondent's Composite Exhibit One.

4. In denying petitioner's motion for post-conviction relief, the state court concluded that Mr. Meyers "fully explored" the insanity defense. Rule 3.850 Order at 9. Such statements are more than findings of historical fact; they amount instead to the court's conclusions leading to its holding that Alvord received effective assistance of counsel. As such, they do not have section 2254(d)'s presumption of correctness.

5. During the period in question, Michigan applied a broader standard for determining insanity than did Florida. Florida applied the M'Naghten test: whether the defendant understood the nature of the act, and that it was wrong at the time of the offense. *Camp v. State*, 149 So.2d 367 (Fla.App.1963). Michigan applied both the M'Naghten and irresistible impulse tests: whether the defendant could control his actions at the time of the offense. The Michigan judgment holding Alvord not guilty by reason of insanity does not state the ground on which it was based. At evidentiary hearing, petitioner suggested that it was based on the M'Naghten standard. An entry in Alvord's medical record shows that the psychiatrist who testified at the Michigan trial considered Alvord not to know right from wrong. I Medical Appendix 58, and Dr. Robey stated that he knew from discussions with the testifying doctor that such was the basis of the adjudication. *See* Trial Rec. at 1156. Florida law apparently gives full effect to a foreign adjudication without regard to the foreign state's test for insanity. *Hixon v. State*, 165 So.2d 436 (Fla.App. 1964). *See* note 16, *infra*.

6. The system then in effect provided for two part-time public defenders who shared the cases assigned to each judge. The benefits of that system were familiarity and cooperation; the expense was a lack of independent advocacy in some cases.

7. For clarity, the Court will refer to the consecutively paginated trial transcript, including papers filed with the trial court and transcripts of pretrial hearings, as "Trial Rec." When the consecutive page numbers are difficult to discern, the Court will cite the transcript pages as well.
The Court will also occasionally refer to the deposition testimony of trial counsel, appellate counsel, and Dr. Robey. Such references are for illustrative purposes only; all findings are based on the state court record or on testimony adduced at the evidentiary hearing. *See* 28 U.S.C. § 2246.

8. Dr. Robey testified at the sentencing hearing that he first saw Alvord in Michigan in November 1969, Trial Rec. at 1144, and that he saw him "more or less continuously from 1969 up until the time of his escape in 1973." *Id.* at 1168.

9. Rule 3.850 Order at 5; *see* Trial Rec. at 15 (Dr. Robey's Report, January 9, 1974).

168, but Dr. Robey was allowed to testify at the hearing that his examination of Alvord had him to the opinion that petitioner was indeed competent to stand trial. The doctor also testified that the Michigan courts had referred Alvord for examination some five times over the years during which he had supervised Alvord's mental treatment, that Alvord had escaped from a Michigan mental institution, and that his illness was of a type that could suddenly recur or go into long remissions. He stated that he knew more about Alvord than any other doctor in Michigan, but gave Mr. Meyers the names of two other treating psychiatrists. Trial Rec. at 160–61. The trial court granted the state's motion, in which Mr. Meyers joined, for further mental examination by Dr. Robey to determine Alvord's sanity at the time of the offense, but stated that "if the defendant continues to refuse to talk to [Drs. Sprehe and Gonzalez], then the Court has no alternative but to deny any defense of insanity that may be raised in this case." Trial Rec. at 167.[10] Just before the hearing ended, Alvord moved the court to discharge Mr. Meyers as his counsel, stating he had "no faith in any persons representing the Public Defender's Office." Trial Rec. at 171. The court responded by letting Alvord "take this up with the Public Defender .... You might accommodate him by filing a written motion, Mr. Meyers, if you so desire." Trial Rec. at 171–72; *see* Trial Rec. at 188–89.[11] Thereafter, Alvord apparently asked Mr. Meyers not to file such a motion. Meyers Depo. at 34.

Dr. Robey examined Alvord later that day for slightly over two hours and wrote a letter to the court and counsel from Michigan on January 9, 1974, giving his opinion that under Florida's M'Naughten standard, Alvord was criminally responsible at the time of the offense. Trial Rec. at 15 (opinion letter of Dr. Robey). On January 10, 1974, the court again directed that Alvord be examined by the court-appointed psychiatrists. Trial Rec. at 17. At a competency hearing on January 11, 1974, Dr. Sprehe gave a qualified opinion that Alvord was competent to stand trial; the doctor was uncertain because he had been able to spend less than ten minutes with petitioner, who was still uncooperative. Trial Rec. at 175. Dr. Gonzalez stated no opinion because Alvord had only spoken to him for three to five minutes. The court found Alvord competent to stand trial: "I have no alternative under the circumstances but to presume, first of all, that the defendant is competent to stand trial until I am shown otherwise, and that the presumption is now even strongly enhanced by the psychiatric report of Dr. Robey. So, I will adjudicate the defendant competent to stand trial." Trial Rec. at 189.

On February 5, 1974, with a February 25 trial date approaching, the court issued a third order, again directing the court-appointed doctors to try to examine Alvord.[12] At hearing on February 8, 1974, Dr. Sprehe, having spent fifteen minutes with Alvord, testified that in his opinion Alvord was competent to stand trial. Trial Rec. at 200–10. Dr. Gonzalez testified a week later that he still was without an opinion because he had again found Alvord uncooperative; he suggested that Alvord be committed for observation. Trial Rec. at 211–22. Neither doctor stated an opinion about Alvord's sanity at the time of the offense. The following colloquy between the court and Mr. Meyers took place at the February 15, 1974 hearing:

10. Later, the judge made the same observation: You know, you can't have your cake and eat it too. You either got to go one way or the other. You either want to be examined to determine if you have a mental defense or you don't want to be examined. If he doesn't want to be examined and he is not going to present any defense of insanity in this case, I am sure that the State is ready for trial. Trial Rec. at 169.

11. See also Trial Rec. at 27 (Alvord's January 22, 1974 handwritten motion to discharge the public defender; denied by the court); Trial Rec. at 195–99.

12. This time, the court's order indicates that it was issued on defendant's motion. Trial Rec. at 58.



The Court: [H]e failed to cooperate with the doctors. He then through his attorney requested that I give him another opportunity. He evidently did cooperate with one doctor. But now refused to with this doctor.

Mr. Meyers: The problem here, Judge, he was up in Michigan been adjudicated incompetent.

The Court: I don't know that.

Mr. Meyers: There is a legal presumption that a person is, once adjudicated, is incompetent until adjudicated otherwise.

The Court: I have no knowledge of this. There has been nothing shown to this Court that he has ever been adjudicated incompetent on the basis of any document or testimony. This Court doesn't have that before it. And until such time as the Court has something of that nature before it, I have to presume the defendant to be competent.

Mr. Meyers: Okay. Well, I have no further questions, Judge.

Trial Rec. at 216–17. The Court again declared Alvord competent to stand trial.

On the prosecutor's motion, trial was continued from February 25 to April 1, 1974. On March 26, 1974, Mr. Meyers filed a notice of intent to claim insanity, now inexplicably absent from the trial record.[13] He also filed a motion to transfer Alvord to a state hospital, to which motion he attached the Michigan adjudication of insanity and order of commitment. The motion was denied. *See* Trial Rec. at 71–75. Mr. Meyers moved to dismiss the indictment on March 28, 1974, citing legal grounds ranging from the age of those serving on the indicting grand jury to the unconstitutionality of the death penalty. Trial Rec. at 78.

Trial began on April 1, 1974. As part of its strong case against Alvord, the state introduced a statement made by petitioner to a detective upon his arrest in Michigan for theft; Alvord apparently stated that he was not a thief, he was a rapist. Trial Rec. at 922. On direct examination, Mr. Meyers asked Alvord to explain that statement:

Mr. Meyers: Well, did you make the statement that he said you made, though?

Alvord: Probably did, yes.

Mr. Meyers: And why did you say that?

Alvord: Well, then, again—can I ask somebody a question here?

Mr. Meyers: No. Just go ahead and answer the question. Why did you say that statement to him.

Alvord: Because I was acquitted for kidnap and rape previously. Maybe—

Mr. Meyers: For what reason?

Alvord: By reasons of insanity.

Mr. Meyers: All right. Is that what you were referring to?

Alvord: Yes.

Mr. Meyers: And were you at all referring to any murder in Tampa?

Alvord: Definitely not.

Trial Rec. at 975–976.

The fact that Alvord had previously been found not guilty of kidnapping and rape by reason of insanity and the fact that he escaped from a Michigan mental hospital in 1973 arose at several other points during the trial. Mr. Meyers moved for a mistrial on the morning of the third day of trial, arguing that a newspaper article had appeared that morning describing "Mr. Alvord's acquittal previously by reason of insanity on charges of kidnap and statutory rape," and his subsequent "escape from the hospital up in Michigan in January of 1973."

13. The original notice of intent to claim insanity was filed as Respondent's Exhibit Three at the evidentiary hearing in this Court on May 13, 1982. The document reads, in pertinent part:

> [T]he defendant intends to prove the defense of insanity by producing a certified copy of an ORDER OF COMMITMENT TO DEPARTMENT OF MENTAL HEALTH AS NOT GUILTY BY REASON OF INSANITY, filed in the Washtenaw County Circuit Court, State of Michigan, on June 3, 1970, a copy of which is attached hereto and made a part hereof.
>
> Inasmuch as defendant has previously been adjudicated incompetent, he is legally presumed to remain incompetent until adjudicated otherwise.

(typeface in original). The attachment referred to in the notice is a part of Exhibit Three.

Trial Rec. at 735. Alvord testified, as set out above, that he had been "acquitted" "by reasons [sic] of insanity." On cross-examination, the prosecutor quibbled with Alvord's use of the word acquitted: "Isn't that rather not guilty because of your insanity, rather than an acquittal of not guilty?" [14] Trial Rec. at 979. He brought out the fact that Alvord had escaped from the mental hospital before coming to Florida, Trial Rec. at 980, and, when questioning petitioner about a gun he had allegedly sold immediately after the killings, the prosecutor commented on an "[e]scapee from a mental hospital walking around with a gun like that." Trial Rec. at 981.

Mr. Meyers did not request an instruction on the presumption of insanity because he "wasn't able to develop the insanity defense the way it . . . should be developed because of the lack of cooperation with [A]lvord." Meyers Depo at 49. The jury returned verdicts of guilt on all three counts.

2. *Ineffective Assistance of Counsel.*

[3, 4] The sixth amendment guarantees to criminal defendants the effective assistance of counsel; that is, of an attorney reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc); *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974). The standard remains the same whether counsel was retained or appointed. *Cuyler v. Sullivan*, 446 U.S. 335, 344–45, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). In order to succeed on a claim of ineffective assistance of counsel, a federal habeas petitioner must prove his entitlement to relief by a preponderance of the evidence. *Washington v. Strickland*, 693 F.2d at 1250; *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).

[5, 6] The major ground of petitioner's ineffective assistance claim is Mr. Meyers' failure to investigate and present Alvord's insanity defense. Constitutionally effective counsel must conduct a "reasonable amount of pretrial investigation." *Washington v. Strickland*, 693 F.2d at 1251; *see Washington v. Watkins*, 655 F.2d at 1355–56. The standard governing the amount of pretrial investigation that is reasonable cannot be articulated with precision, for it "necessarily depend[s] upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel." *Washington v. Strickland*, 693 F.2d at 1251; *Washington v. Watkins*, 655 F.2d at 1357. The Fifth Circuit has noted, however, that its admonition against assessing counsel's performance "through the finely ground lenses of 20/20 hindsight" "is especially compelling in reviewing claims . . . grounded in allegations of inadequate investigation and preparation." *Washington v. Watkins*, 655 F.2d at 1356. Instead, the reasonableness of counsel's assistance must be judged " 'from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to him at the time in question.' " *Washington v. Strickland*, 693 F.2d at 1251 (quoting *Washington v. Watkins*, 655 F.2d at 1356).

The en banc *Washington v. Strickland* court recently analyzed a failure-to-investigate claim by describing in five paradigms

14. Mr. Meyers later objected to the prosecutor's quibble and moved for a mistrial:

> I would like to move for a mistrial on the grounds that the prosecution did and was allowed to go into the matter of the defendant's record or finding of not guilty by reason of insanity for the rape and kidnapping up in Michigan. It's my contention that the matter should have been left there. But the prosecution pressed forward and also got the defendant to try to explain that even though he was acquitted of this, that he was, in fact, guilty of it and subsequently found [sic—not] guilty because of insanity.

Trial Rec. at 1004.



those situations that might underlie such a claim. 693 F.2d at 1252–58. The court began with perhaps the clearest breach of the duty to investigate: cases in which trial counsel perceived only one plausible line of defense for his client, but failed to conduct a substantial investigation thereof. *Id.* at 1252–53. "[P]ermissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense." Id. at 1252; *e.g. Gomez v. Beto*, 462 F.2d 596 (5th Cir.1972).

Against this clear case, the court compared two other paradigms that are relevant to this petition. It focused on the necessary content of a "reasonably substantial investigation" by positing its second class of cases, holding to the now routine conclusion that effective defense counsel " 'is not required to pursue every path until it bears fruit or until all conceivable hope withers.' " 693 F.2d at 1253 (quoting *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980)). "Rather, attorneys must conduct a substantial investigation which includes 'an independent examination of the facts, circumstances, pleadings and laws involved.' " *Id.* at 1253 (quoting *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir.1979)).

Finally, the court identified the role of trial strategy in cases of this kind by describing as its fourth paradigm cases in which "counsel fail[ed] to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." *Id.* at 1254. Ideally, an attorney should investigate all possible defenses before choosing to exclude some at trial, but achievement of that ideal is not required by the sixth amendment. "Often, counsel will make a choice of trial strategy relatively early in the representation process after conferring with his client, reviewing the state's evidence, and bringing to bear his experience and professional judgment." *Id.* (footnote omitted). The distance between ideal and constitutional minimum is significant under *Washington v. Strickland*, however: "Whereas a strategy chosen after full investigation is entitled to almost automatic approval by the courts, a strategy chosen after partial investigation must be scrutinized more closely . . . ." *Id.* at 1255.

This petition presents a difficult variation on the paradigms set out in *Washington v. Strickland*. The facts as trial counsel knew them suggested two possible defenses: the available insanity defense, which Meyers considered Alvord's only real hope, and the unsupported alibi, which Alvord consistently asserted and to which he eventually testified at trial. Primarily because of Alvord's opposition to an insanity defense, counsel went to very little effort to investigate that defense before trial. The major issue underlying Alvord's claim of ineffective assistance, then, is whether and to what extent a criminal defendant's expressed unwillingness to raise a particular defense absolves his attorney of the responsibility to investigate and present that defense.

The record reveals that Mr. Meyers did very little independent investigation of Alvord's potential insanity defense. He obtained only a small portion of his client's voluminous medical record, and made no effort to have even that small part interpreted by a qualified psychiatrist. Meyers Depo. at 29, 42–43. He made no effort to contact anyone in Michigan, where Alvord spent 25 of his 26 years; specifically, he never contacted the doctors who had treated his client at the Ionia State Hospital. *Id.* at 57. After Alvord refused for the first time to speak to the two court-appointed psychiatrists, counsel chose not to be present at the several subsequent examinations, even though he knew that Alvord's uncooperativeness was on the stated ground that his attorney was not present. He also made no effort until a few days before trial to seek reconsideration of the trial court's ex parte December 6, 1973 order vacating the order of commitment. In the absence of an independent investigation, counsel neither explored the helpful facts and opinions to which Dr. Robey might have testified nor brought out the substantial qualifications that the doctor himself placed on his opinion that Alvord was sane at the time of

the offense.[15] In short, Mr. Meyers undertook virtually no investigation of the one defense he considered viable in Alvord's case, choosing instead to comply with Alvord's request that he put petitioner on the stand and proceed with an alibi defense.

[7] The question presented in this claim, as framed by the court in *Washington v. Strickland*, is whether trial counsel made a reasonable choice based upon reasonable assumptions when he rejected the uninvestigated insanity defense in favor of Alvord's alibi:

> The choice by defense counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice.
>
> ....
>
> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.

693 F.2d at 1254–55 (citations and footnotes omitted). To resolve that question, the Court must briefly review the strength of the state's case and of the alternative defense and must consider the impact of Alvord's refusal to proceed with an insanity defense upon his attorney's exercise of professional judgment.

The state presented a strong case that petitioner had committed the acts of which he was charged. Zelma Hurley, Alvord's girlfriend, testified that he had confessed committing the crimes to her the morning after they allegedly took place. Trial Rec. at 753–54. The prosecution also introduced testimony concerning certain items—a cigarette lighter, jewelry, a watch, and some cash—allegedly stolen from the victims. Hurley testified that Alvord had some of these items just after the killings took place, Trial Rec. at 750, 757–59, and Terri Williams, another friend of Alvord, stated she saw them in his possession in Detroit about one week after the crimes occurred. Trial Rec. at 879–82. The items were apparently never found. Trial Rec. at 853 (testimony of Detective John W. Reed). Other circumstantial evidence was introduced further tying Alvord to the crime scene. Finally, as described above, the state introduced a statement made by petitioner upon his arrest in Michigan for theft to the effect that he was not a thief, he was a rapist. Trial Rec. at 922. *See* section IV, *infra*.

Against this strong case, Alvord's sole defense was an uncorroborated alibi. He took the stand and testified that from nine to midnight on the night of the killings he was with Zelma Hurley at the home of one Joe Duncan, that they left around midnight and spent the next hour to hour and a half at a bar, the Sportaman's Lounge, and that they returned to their apartment about 1:15 a.m. Alvord stated that he had seen a friend, Jeanine Brautigan, at the lounge that night, but she did not testify. After dropping Hurley off at the apartment, Alvord assertedly went to the Davis Island Hotel to find a friend. Unable to locate the friend, he spent another hour to hour and a half at a bar adjoining the hotel and returned home, where he passed out in the car until daybreak. He also stated that he had consumed a substantial quantity of beer and had smoked a certain amount of marijuana during the course of the evening. No other witness testified in support of this alibi defense.

The alternative defense, of course, was that of insanity. Had he chosen to do so, Mr. Meyers could easily have raised the presumption of incompetence and insanity available to Alvord by virtue of his prior adjudication in Michigan.[16] *See Parkin v. State*, 238 So.2d 817 (Fla.1970); *Horace v. Culver*, 111 So.2d 670 (Fla.1959); *Wells v. State*, 98 So.2d 795 (Fla.1957); *Livingston v. State*, 383 So.2d 947 (Fla.App.1980); *Hixon v. State*, 165 So.2d 436 (Fla.App.1964). The state would thereby have been put to the burden of proving beyond a reasonable doubt that Alvord was sane at the time of the offense.[17] *Horace v. Culver; Parkin v. State*. The apparent importance of this presumption is diminished somewhat by the fact that one who has never been adjudicated insane need only produce evidence raising a "reasonable doubt as to sanity" in order to put the state to its burden of proving sanity beyond a reasonable doubt. *See Byrd v. State*, 297 So.2d 22 (Fla.1974). By affording defendants the presumption of insanity, Florida has simply provided an easy avenue by which those who have been adjudicated insane might raise the "reasonable doubt as to sanity" that ordinarily puts the prosecutor to his heavy burden of proof on the issue.

[8] Resolution of Alvord's ineffective assistance claim necessarily involves consideration of Mr. Meyers' reasons for choosing not to assert the largely uninvestigated insanity defense. *Washington v. Strickland*, 693 F.2d at 1254–55. Counsel testified both before this Court and in his deposition that his major reason was Alvord's unwillingness to raise the defense or cooperate in its preparation and presentation. This is not a case in which the accused was willing to assert the defense, but was of little help in its preparation. In *Davis v. Alabama*, 596 F.2d 1214 (5th Cir.1979), *vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980),[18] the court chided the state of Alabama for attempting to exonerate Davis' attorneys by suggesting that Davis "might have given them more leads, more evidence of his insanity . . . ." 596 F.2d at 1219. "[A] defendant's failure to disclose certain

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15. As developed since trial, Dr. Robey could have disclosed substantial qualifications on his opinion of Alvord's sanity, had he been asked. Indeed, Dr. Robey's deposition is replete with qualifications and reservations. He testified that his opinion was rendered without adequate information; he knew next to nothing of the details of the crime or of Alvord's relationship to the victims. Robey Depo. at 56–58. He stated that the circumstances in which he examined Alvord in January 1974 were inadequate to support a firm opinion, and that defense counsel never spoke to him in substance about his opinion. *Id.* He also indicated that Alvord's post-arrest statement was unknown to him when he rendered his opinions, but that such would have been important. *Id.* at 63–64. In short, Dr. Robey's "opinions were weaker than [he] wanted them to be." *Id.* at 58.

16. Respondent argues without citation that a foreign adjudication cannot raise the presumption of insanity in a Florida court, especially if the foreign adjudication was based upon a standard for determining insanity different from that applied in Florida. *But see Hixon v. State*, 165 So.2d 436 (Fla.App.1964). This issue was never squarely faced in the original trial. *See also* note 5, *supra*.

17. The presumption raised by Alvord's prior adjudication applied not only to the determination of competency to stand trial, but to petitioner's sanity at the time of the offense as well. In *Hixon*, the defendant had been adjudicated insane in Ohio in 1958. He escaped and fled to Florida, where he murdered his former wife. Upon motion for a sanity hearing, Hixon was transferred to the Florida State Hospital for examination by court-appointed doctors. The court adjudicated him incompetent to stand trial on the basis of the doctors' reports, and Hixon was treated for three years at the state hospital. Thereafter, Hixon was found "sane enough" to stand trial, and was convicted. The District Court of Appeal reversed that conviction, however, holding that the presumption of insanity at the time of the offense was never overcome by the state. Thus, neither the fact that the prior adjudication was from another state nor the trial court's finding that Hixon was competent to stand trial dissolved the state law presumption that Hixon was insane at the time of the offense.

18. *Davis* was vacated as moot by the Supreme Court. *Alabama v. Davis*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980). Justice Powell has warned that even after such an action by the Court, the appellate decision in question is "likely to be viewed as persuasive authority if not the governing law" of the circuit. *County of Los Angeles v. Davis*, 440 U.S. 625, 646 n. 10, 99 S.Ct. 1379, 1391 n. 10, 59 L.Ed.2d 642 (1979) (dissenting). Nevertheless, the Fifth Circuit developed the general requirement that defense counsel conduct an independent investigation in cases dating back to 1970, *e.g. Clark v. Blackburn*, 619 F.2d 431, 432 (5th Cir.1980); *Caraway v. Beto*, 421 F.2d 636 (5th Cir.1970), and continues to cite and rely upon the *Davis* decision. *See Beavers v. Balkcom*, 636 F.2d 114 (5th Cir.1981).

information to his attorney is not necessarily, or obviously, or even probably the defendant's fault." *Id.* Alvord was much more than simply reticent in his statements to Mr. Meyers; in the face of the contrary advice of counsel, petitioner stated repeatedly that he was unwilling to assert the defense of insanity at all. The wishes of a client on a matter of this kind cannot be disregarded by defense counsel. In deciding among various defenses, an attorney must be mindful of his client's willingness to proceed on a particular theory, for he may reasonably assume at the very least that the lack of cooperation from an unwilling client would doom the defense—he may also reach the more weighty conclusion that the decision whether to plead insanity is for the accused, not his attorney. *See* American Bar Association, Code of Professional Responsibility EC 7-7, 7-8 (1969); American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Defense Function § 5.2 (App. Draft 1971). To say that defense counsel may at least consider his client's wishes in deciding whether to enter a plea of insanity is not to say that the attorney may lightly reject a potential defense of insanity, raising as it does the possibility that the accused's decision-making faculties may be clouded. *See Davis*, 596 F.2d at 1220.[19] The sixth amendment requires that defense counsel do more than simply obey the possibly pathological wishes of an accused; counsel must, however, take those wishes into account when deciding whether to raise the insanity defense.

A second consideration was the damning opinion of Dr. Robey that petitioner was sane at the time of the offense. Although he might have discovered qualifications on that opinion upon inquiry, Mr. Meyers was not unreasonable in assuming that this opinion, rendered by the psychiatrist who knew Alvord best, would effectively undermine an insanity defense.

Other of Mr. Meyers' concerns may have been more perceived than real. Like the Federal Rules, Florida's Rules of Criminal Procedure did and do require that a defendant who intends to raise the defense of insanity file notice of that intent; in the absence of such a notice, a defendant may not introduce evidence of his insanity. Fla.R.Cr.P. 3.210(e) (now at Fla.R.Crim.P. 3.216(b)); *see* Fed.R.Cr.P. 12.2. But the Florida rule did permit exceptions for good cause shown. Fla.R.Cr.P. 3.210(e) (altered version currently in force, Fla.R.Cr.P. 3.216(f)). *Parkin v. State*, 238 So.2d 817 (Fla.1970), was also not necessarily an insurmountable obstacle. *Parkin* held that a defendant who raises an insanity defense must cooperate with doctors for the prosecution or the court, reasoning that such a defendant ought not be able to refuse to meet with all but his own doctors. But Alvord did cooperate with Dr. Robey, who was sent for by the state and was its key witness at the sentencing hearing, and with Dr. Sprehe—at least long enough on two occasions for that doctor to advance the opinion that Alvord was competent to stand trial.

Petitioner does not contend that his attorney failed to advise him to raise the insanity defense and to cooperate more fully with the court-appointed psychiatrists. *Cf. Brennan v. Blankenship*, 472 F.Supp. 149 (W.D.Va.1979). To the contrary, the record reveals that counsel repeatedly so advised his client. Mr. Meyers could have, and probably should have, done more to investigate the insanity defense of his obviously unstable defendant. But the sixth amendment was not offended when counsel, knowing the essential facts underlying the insanity defense and aware of Dr. Robey's damaging opinion, acceded to his client's stated and adamant objections to asserting

19. Mr. Meyers assumed that Alvord's decision not to assert his insanity defense was based on the fact that "he didn't want to go back to institutions." Meyers Depo. at 42. Dr. Robey testified, on the other hand, that petitioner's refusal to raise the defense was rooted in fears that he would be considered mentally ill, "particularly because of the identification with his mother's mental illness." Robey Depo. at 43. The doctor did nevertheless opine that Alvord was competent to stand trial. *See* Trial Rec. at 148-51.



that defense. Ethical considerations s[illegible] his assumptions that success on an insanity theory would have been impossible without Alvord's cooperation was reasonable under the circumstances, and cannot now be second-guessed.

Having found other aspects of petitioner's claim of ineffective assistance of counsel to be without merit, this Court concludes that Alvord received constitutionally adequate assistance of counsel before and at trial.

B. *Representation at Sentencing.*

1. *The Sentencing Hearing.*

Petitioner also claims that trial counsel failed to provide constitutionally effective assistance at the sentencing phase. Alvord's sentencing was conducted during the evening of April 4, 1974, the same day the jury returned its verdict of guilt. The state called Dr. Robey. Although Mr. Meyers called no witnesses, he testified before this Court that he had planned to call Dr. Robey had the state not done so, for counsel knew that the doctor would testify to two statutory mitigating factors.

After stating his professional qualifications and the general circumstances in which he had come to know Alvord, Dr. Robey testified to certain details of the 1967 Michigan kidnapping and statutory rape of which Alvord was charged. Trial Rec. at 1153–55.[20] He stated that Alvord had been tried to a judge and found not guilty by reason of insanity on the basis of another psychiatrist's testimony that Alvord did not know right from wrong. Dr. Robey's view of Alvord's condition at the time of the Michigan crime was somewhat different, however; he stated at the sentencing hearing in this case that he considered Alvord to have known right from wrong at the time of the Michigan crimes, but to have been acting under irresistible impulse—the second prong of Michigan's insanity standard.[21] The doctor went on to recount Alvord's committment to Ionia State Hospital and his two subsequent escapes. He also described two minor offenses of which Alvord had been convicted.[22] Dr. Robey next described his examinations of Alvord in early 1974, and recited again his opinions that Alvord was competent to stand trial and that he knew right from wrong at the time of the Florida crimes. After explaining Alvord's mental illness in psychological terms, the witness then testified to two mitigating factors: he stated his opinion that Alvord had been "under a great deal of emotional stress" at the time of the offenses, Fla.Stat. § 921.141(6)(b) (1973), and that his capacity to conform his behavior to the requirements of law was "clearly impaired," *id.* § 921.141(6)(f). *See* Trial Rec. at 1178. His direct testimony concluded with his statement that Alvord was dangerous to women.

On cross-examination by Mr. Meyers, Dr. Robey described in fair detail the history of Alvord's mental illness, extending back to the age of thirteen. He stated that Alvord was married and had a child age six. He reiterated his view that Alvord had been under great emotional stress and that he lacked capacity to conform his conduct to the requirements of law. He then stated in quite compelling terms his belief that Alvord's mental illness was not such as to prevent rehabilitation.

After closing arguments, the jury returned an advisory verdict recommending the death penalty, and on April 9, 1974, the trial judge sentenced Alvord to death and entered findings in support of that sentence as required by section 921.141(3), Fla.Stat.

2. *Ineffective Assistance of Counsel.*

Petitioner contends that counsel rendered ineffective assistance at the penalty phase because: first, he failed to collect and present in mitigation Alvord's extensive medical record indicating his history of mental illness; second, he failed to cross-ex-

20. Mr. Meyers' hearsay objection was overruled. Trial Rec. at 1152–53.

21. See note 5, *supra*.

22. The parties later agreed that each of these were misdemeanor convictions. Trial Rec. at 1197–98.

amine Dr. Robey effectively due to his general lack of familiarity with Alvord's psychiatric history; third, he failed to produce as "rebuttal witnesses" other doctors, including Alvord's treating psychiatrists in Michigan; and fourth, he failed to produce character witnesses to humanize Alvord in the eyes of judge and jury.

[9–11] One accused of capital crime has a sixth amendment right to effective assistance of counsel at the penalty phase, as well as during certain pretrial proceedings and at the trial itself. *See Stanley v. Zant*, 697 F.2d 955 (11th Cir.1983); *Washington v. Strickland*; *Proffitt v. Wainwright*, 685 F.2d 1227, 1245 (11th Cir.1982); *Davis v. Alabama*, 596 F.2d at 1217. Essentially the same standard applies when assessing counsel's performance at the sentencing hearing as applies in gauging his effectiveness at trial, that of "reasonably effective assistance." *Proffitt*, 685 F.2d at 1245. The Constitution does not require errorless counsel, and although its requirements are theoretically no more strict in capital cases than in other criminal cases, " 'the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance.' " *Stanley*, at 962 (quoting *Proffitt*, 685 F.2d at 1287).

[12] Upon detailed review of the record, this Court concludes that the adequacy of counsel's performance at and in preparation for the sentencing hearing may have fallen below constitutional requirements. His almost total failure to investigate the facts supporting mitigating circumstances simply cannot be overlooked.

First, as was true in connection with his investigation of the insanity defense, Mr. Meyers failed to seek out and interview Alvord's treating psychiatrists in Michigan. He made no effort to obtain Alvord's complete medical history, nor did he retain an independent psychiatrist to review the small portion of the medical record that he did have. It may well be repeated that counsel never chose to appear with one of the court-appointed psychiatrists at one of their attempted examinations of Alvord, even though he knew that Alvord's stated objection to being examined was that his attorney was not present. Largely these same failings in Mr. Meyers' investigation were considered in assessing his performance in preparation for and during the trial. Specifically, this Court concluded that counsel's failure to investigate matters relating to the insanity defense did not render his representation of petitioner constitutionally ineffective in light of Alvord's absolute unwillingness to pursue that defense. That element is absent with regard to the sentencing phase, however. Indeed, respondent has suggested no assumption to the Court, reasonable or otherwise, that might explain counsel's failure to investigate Alvord's medical history for the purposes of the sentencing hearing. Mr. Meyers' tactic was to rely on those mitigating factors that relate to the mental condition of the accused at the time of the offense, but he made no effort to obtain or present any facts relating to those mitigating circumstances other than the conclusions of Dr. Robey brought out on direct examination and accentuated on cross.

[13] Second, counsel made no effort to contact or interview anyone who might have testified as a character witness in Alvord's behalf. *Cf. Proffitt*, 685 F.2d at 1247–48. The Eleventh Circuit has now rejected the argument that counsel acts under an absolute duty to investigate and present mitigating character evidence in every capital case. *See Stanley*, at 958–62. Indeed, the *Stanley* court noted that to the date of that decision no panel of the Fifth or Eleventh Circuits had found ineffective assistance on the basis of defense counsel's failure to produce character witnesses at the penalty phase. *Id.*, slip op. at 1486. Mr. Meyers explained his failure to introduce character witnesses as the result of Alvord's "lack of communication" with his family. An attorney's responsibility to make an independent investigation is not discharged by his client's lack of communication with potential witnesses, *see Davis*, 596 F.2d at 1219, but this fact may reasonably lead counsel to assume that petitioner's family might not prove fertile ground in



which to search for character witnesses. Moreover, reliance on general character witnesses may have proved somewhat inconsistent with counsel's chosen tactic to rely on petitioner's psychiatric condition in mitigation of sentence. *See Stanley*, at 966–70. The Supreme Court has emphasized in a recent line of cases the importance at the penalty phase of character evidence and evidence of any personal circumstance that might lead the sentencer to be merciful. *E.g. Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). *See Songer v. State*, 365 So.2d 696, 700 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Such evidence is often critical to balance the inevitable impression of an accused's character left upon his conviction for murder. Although it is patently insufficient to explain counsel's inadequate investigation of Alvord's psychiatric history, Mr. Meyers' tactical choice to rely on the mitigating factors relating to the accused's mental condition may justify his failure to do more than he did in the way of investigating possible character witnesses.

The Court is prepared to conclude that counsel rendered constitutionally deficient representation by failing to undertake a reasonable investigation into Alvord's psychiatric history. It need not formally so conclude, however, for petitioner has shown no prejudice arising from any of the aspect's of Mr. Meyers' performance that were assertedly ineffective.

3. *Prejudice.*

[14] Petitioner has offered the testimony of no independent psychiatrist available at the time who might have testified more favorably than Dr. Robey at sentencing.[23] A federal habeas petitioner must demonstrate his entitlement to relief by a preponderance of the evidence. *Washington v. Strickland*, 693 F.2d at 1250. Indeed, the major appellate decisions dealing with the necessary performance of counsel at sentencing have been predicated upon petitioner's introduction of evidence that might have been brought out upon adequate investigation. *E.g. Stanley*; *Washington v. Strickland*. *See Washington v. Watkins*, 655 F.2d at 1363. Petitioner herein has simply not offered any evidence of psychiatric testimony that might have been revealed upon a more thorough investigation. Furthermore, although independent experts might have disagreed with Dr. Robey's view that Alvord was sane at the time of the offenses, they could have added nothing to Dr. Robey's testimony at sentencing, for that testimony fully supported Alvord's position with regard to both of the mitigating factors that focus on mental condition. Fla.Stat. §§ 921.141(6)(b), .121(6)(f). The sentencing judge found these factors to have been established in this case. Trial Rec. at 97. Accordingly, even assuming that helpful testimony of independent experts might have been available, Mr. Meyers' failure to investigate and present it did not result in "actual and substantial disadvantage" to petitioner in the course of the sentencing hearing. *Washington v. Strickland*, 693 F.2d at 1262.

Similarly, the Court finds no prejudice arising from Mr. Meyers' failure to identify and produce character witnesses; again, petitioner has not indicated to this Court any such testimony that might have been revealed upon adequate investigation. Accordingly, this Court concludes that counsel's failure to investigate possible character witnesses did not work to petitioner's "actual and substantial disadvantage." *Id.*

Petitioner having suffered no legally cognizable prejudice, this Court concludes that his claim of ineffective assistance of counsel at the sentencing hearing is without merit.

C. *Representation on Appeal.*

Petitioner's second ground for relief is that he was denied effective assistance of

23. Petitioner did file the deposition of Dr. Francis Walls, a psychiatrist with the Florida State Prison System who came into contact with Alvord after his conviction. Dr. Walls did not testify at the evidentiary hearing. This Court has nevertheless read and considered Dr. Walls' deposition testimony.

counsel on his direct appeal to the Florida Supreme Court.[24] Specifically, petitioner contends that appellate counsel, Richard Seymour, Esquire,[25] provided constitutionally deficient representation because he failed to raise five "significant issues which should have been brought to the reviewing court's attention." These issues were whether the trial court erred: first, by not "responding to petitioner's pro se plea to remove the public defender" as his attorney; second, by not instructing the jury sua sponte on the presumption of insanity; third, by setting aside its November 2, 1973 order committing petitioner for psychiatric examination; fourth, by allowing Dr. Robey to testify to Alvord's competency and sanity based on an examination made without notice to defense counsel and in violation of Alvord's fifth amendment privilege; and fifth, by allowing the doctor to testify at the sentencing hearing to certain prior crimes of which Alvord was not convicted and which were otherwise excludable. Although it may be unnecessary, each of these several contentions will be discussed in turn.

1. *The Standard.*

[15] The level of effectiveness constitutionally required of appellate counsel has been considered far less frequently than has that of trial counsel. The Supreme Court has stated in a slightly different context, however, that counsel on appeal must take "the role of an active advocate in behalf of his client." *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). Various courts of appeal, including those for the Fifth and Eleventh Circuits, have applied an analysis substantially similar to that applied in claims of ineffective assistance at trial. *E.g. Mylar v. Alabama*, 671 F.2d 1299 (11th Cir.1982); *Mendiola v. Estelle*, 635 F.2d 487 (5th Cir.1981). *See Cuyler v. Sullivan*, 446 U.S. 335, 344–45, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). Typically, claims of ineffective assistance on appeal turn on counsel's complete failure to file or prosecute the appeal, *e.g. Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir.1983); *Mack v. Smith*, 659 F.2d 23 (5th Cir.1981); *Chapman v. United States*, 469 F.2d 634 (5th Cir.1972); *see Perez v. Wainwright*, 640 F.2d 596 (5th Cir.1981), and appellate counsel ordinarily need not assert, on a properly perfected appeal, grounds that he reasonably considers meritless. *Mendiola; Hooks v. Roberts*, 480 F.2d 1196 (5th Cir.1973), *cert. denied*, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974); *see Mylar*, 671 F.2d at 1300–01 (appellate counsel must render "'reasonably effective performance.'") (quoting *United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir.1981)). This Court will therefore proceed to assess whether Mr. Seymour's advocacy fell below the standard of reasonably effective assistance when he failed to raise the various legal arguments listed by petitioner.

2. *The Public Defender.*

[16] The first ground proposed by petitioner for finding ineffective assistance on appeal is easily disposed of: Alvord contends that appellate counsel should have raised the trial court's failure to remove the public defender as defense counsel. The state collateral review court found as a matter of historical fact that Alvord "ultimately consented to being represented by Assistant Public Defender Thomas Meyers . . . ." Rule 3.850 Order at 2. *See also Alvord v. State*, 396 So.2d at 188. This

24. Petitioner raised this claim on state collateral review, relying on most of the grounds asserted before this Court. He has therefore satisfied the requirement of exhaustion of state remedies. 28 U.S.C. § 2254(b). The conclusion of the state court in denying this claim does not warrant section 2254(d)'s presumption of correctness, for the constitutional effectiveness of appellate counsel, like that of trial counsel, presents a mixed question of law and fact. *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

25. It appears from Mr. Seymour's deposition and his testimony before this Court that his "assignment" to handle Alvord's appeal came about under unusual circumstances. Seymour Depo. at 6–8, 11, 37–41. Upon due consideration, the Court does not consider these circumstances to affect the ineffective assistance analysis; it is clear, however, that Mr. Seymour acted as appointed counsel.



finding is fairly supported by the record, 28 U.S.C. § 2254(d)(8), which was certainly strong enough on this point to have lead reasonable counsel to decide not to raise the issue on appeal. *See United States v. Young*, 482 F.2d 993 (5th Cir.1973).

3. *Sua Sponte Insanity Instruction.*

[17] Petitioner also contends that appellate counsel was ineffective because he did not raise the trial court's failure to instruct sua sponte on the continued presumption of insanity. The simple answer to this contention is that trial counsel, not the trial court, bears responsibility to raise defenses and to request instructions in accordance therewith. In a typical case, the trial judge cannot and should not be saddled with the duty to second-guess counsel's tactical choice of defenses and to instruct sua sponte on defenses that might have been raised.

[18, 19] Petitioner cites *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), to the contrary. *Winship* held that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364, 90 S.Ct. at 1073. In the line of cases of which this aspect of *Winship* is part, the Supreme Court has articulated the circumstances in which due process is violated by placing upon a criminal defendant the burden of proving a particular fact. *E.g. Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (no violation in defendant's burden to prove affirmative defense of "extreme emotional disturbance"); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (due process violated in requiring defendant to prove heat of passion to rebut presumption of murder); *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (no violation of defendant's burden to prove insanity beyond a reasonable doubt).[26] *See also Mason v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982) (violation in presuming intent to kill). No matter how a state designs its presumptions on the issue, insanity remains an affirmative defense unless the sanity of the accused is expressly defined as part of the crime charged. *Leland; see Walker v. Butterworth*, 599 F.2d 1074 (1st Cir.), *cert. denied*, 444 U.S. 937, 100 S.Ct. 288, 62 L.Ed.2d 197 (1979); *United States v. Greene*, 489 F.2d 1145 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1974). Florida's statute does not require proof of a defendant's sanity as an element of first degree murder, Fla.Stat. § 782.04(1)(a), and petitioner's appeal to due process principles in this regard therefore fails.[27] The trial court had neither procedural nor constitutional responsibility to raise the defense on his own.[28] This was precisely the reason Mr. Seymour did not raise the issue, Seymour Depo. at

26. Although its continued vitality has been questioned in light of *Winship*, *see* W. LaFave & A. Scott, Criminal Law § 8 at 48 (1972), *Leland* remains good law. *See Rivera v. Delaware*, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976) (cited in *Patterson*).

27. This Court need not consider the extent to which due process requires the trial judge to instruct sua sponte on each element of the offense.

28. Petitioner cites *Wider v. United States*, 348 F.2d 358 (D.C.Cir.1965), but *Wider* involved the trial court's ongoing obligation to raise and determine the accused's competency to stand trial. This Opinion should not be read to suggest otherwise, but competency to stand trial is an issue distinct from the substantive defense of insanity. A trial court must always consider the competency of a defendant to stand trial, *see Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); it need not raise sua sponte any substantive defenses that the defendant does not assert.

Cases such as *Byrd v. State*, 297 So.2d 22 (Fla.1974), simply require an insanity instruction when the defense is asserted and the defendant introduces evidence thereon sufficient to raise a reasonable doubt as to his sanity. They do not require the trial court to raise the defense itself—that is up to the defendant and his attorney. *Johnson v. State*, 118 So.2d 234 (Fla.App.1964), is also not to the contrary. That decision simply states the self-evident requirement that the trial court instruct correctly on the presumption of insanity; it cannot be read to obligate the judge to raise Alvord's defense for him.

35, and he certainly cannot be faulted for that decision.

4. *Refusal to Commit for Observation.*

[20] Petitioner next contends that appellate counsel provided ineffective assistance by failing to raise the trial court's error in setting aside its November 2, 1973 order committing Alvord to the state mental hospital for observation. The trial judge set aside his commitment order because, apparently after consulting with state agency officials, he became convinced that he was without authority to commit Alvord under the circumstances. Petitioner argues that the trial judge had that authority under Rule 3.210, Fla.R.Crim.P., that he erred in not exercising it, and that appellate counsel should have cited that error on appeal. Respondent contends that Rule 3.210 does not grant the authority to commit for determination of sanity, and that appellate counsel was prevented from raising the issue before the Florida Supreme Court by such cases as *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Respondent misunderstands the Supreme Court's holding in the three cases cited to this Court, *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *Wainwright v. Sykes*. *Wainwright* and *Engle* hold that a state habeas petitioner may not obtain federal collateral relief based on trial errors to which no required contemporaneous objection was made unless he can make the now familiar showing of cause and prejudice. *Frady* applied that principle to a movant under 28 U.S.C. § 2255. Whether Mr. Seymour could have raised this alleged error of the trial court on appeal before the Florida Supreme Court is entirely a question of state law.

The Florida Supreme Court, like most other appellate courts, adheres to the principle that it should not reach issues which the trial court did not have a "full and adequate opportunity to consider." *In re Beverly*, 342 So.2d 481, 489 (Fla.1977); *see Dober v. Worrell*, 401 So.2d 1322 (Fla.1981); *Silver v. State*, 188 So.2d 300, 301 (Fla. 1966). This contemporaneous objection rule is grounded in the familiar purpose of giving the trial court an opportunity to consider the issue in question. *See Corbett v. Dade County Board of Public Instruction*, 372 So.2d 971, 974–75 n. 3 (Fla.App.1979). In this case, however, the trial judge had ample "opportunity to consider" the commitment issue. Indeed, he considered it once in November 1973, when he committed Alvord, and again in December when he vacated the commitment order. Moreover, on March 26, 1974, Mr. Meyers moved, albeit belatedly, to transfer Alvord to a state hospital. It is clear, however, that Mr. Seymour considered this issue to be only arguably preserved for appellate review. In reaching this conclusion, counsel was under the mistaken impression that Mr. Meyers had never moved to have Alvord committed. Seymour Depo. at 31–33; *see* Trial Rec. at 74 (Motion to Transfer Defendant to State Mental Hospital for Observation to Determine Sanity).

The law was notably unclear in 1973 and 1974 on the obligation—not to mention authority—of a Florida judge to order a criminal defendant committed for observation to determine his competency to stand trial or insanity at the time of the offense. The prevailing procedures at that time were in Rule 3.210, Fla.R.Crim.P., headed "Insanity." Subsection (a) dealt with what has come to be known as competence to stand trial. It provided that when, upon its or the defendant's motion, the trial court develops "reasonable ground to believe" that the defendant is incompetent, it must "immediately fix a time for a hearing to determine the defendant's mental condition." *See Fowler v. State*, 255 So.2d 513 (Fla. 1971) (construing essentially identical predecessor to quoted section). In order to determine whether a defendant is competent to stand trial the court was authorized to appoint up to three psychiatric experts to examine him and testify. If necessary, "the court may order the defendant taken into custody until the determination of his sanity [i.e. competence] can be made." Fla. R.Crim.P. 3.210(d). *See Lederer v. Stack*, 294 So.2d 107 (Fla. 4th DCA 1974) (court must "fix a time" for competency hearing before defendant may be incarcerated under subsection).[29] If the defendant is found competent he proceeds to trial; if he is found incompetent, he is then committed "to the Division of Mental Health for hospitalization under the provisions of Fla.Stat. § 394.467, F.S.A.," subject to continuing review. Fla.R.Crim.P. 3.210(a)(3); *see Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). The rule did not contain specific provision for commitment as a first step in determining competence to stand trial, nor did it expressly allow commitment to enable psychiatric examination of an accused's mental state at the time of the crime. *See* Fla.R.Crim.P. 3.210(c).



[21] Petitioner argues that the trial court was nevertheless constitutionally compelled to commit him for observation. One prong of this contention is that commitment was required in order to make a constitutionally adequate determination of Alvord's competency to stand trial. Years ago the Supreme Court settled the proposition that due process is violated by conviction of an accused while he is legally incompetent to stand trial. *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956).[30] A decade later, the Court safeguarded that due process guarantee by a separate procedural due process right to a competency hearing whenever the facts or events before the trial court raise a "bona fide doubt" as to the defendant's competency to stand trial. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *see Acosta v. Turner*, 666 F.2d 949 (5th Cir. Unit B 1982). Several hearings were held in this case to determine petitioner's competence to stand trial, and this Court cannot say that the procedures undertaken by the trial court were insufficient under *Pate*. *See Reese v. Wainwright*, 600 F.2d 1085, 1090–92 (5th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979); *Greenfield v. Gunn*, 556 F.2d 935 (9th Cir.), *cert. denied*, 434 U.S. 928, 98 S.Ct. 413, 54 L.Ed.2d 288 (1977). The trial court was therefore not required by *Pate* to commit Alvord for observation.

The second prong of petitioner's constitutional argument is that commitment was required because it afforded "the best opportunity to determine the viability of an insanity defense." Petitioner's Memorandum, March 10, 1982, at 30. Two court-appointed psychiatrists tried several times to examine Alvord, but he refused each time on the stated ground that his lawyer was not present. Dr. Robey, an expert brought to Florida by the state and subsequently requested by the court to examine Alvord to determine sanity, succeeded in talking to Alvord for some two hours and concluded, although qualifiedly, that petitioner was sane under Florida's M'Naghten standard at the time of the offense. This Court can find no constitutional violation in the extent of expert psychiatric assistance provided by the state in this case. *See United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568, 73 S.Ct. 391, 395, 97 L.Ed. 549 (1953); *Payne v. Thompson*, 622 F.2d 254, 255 (6th Cir.1980); *cf. United States v. Taylor*, 437 F.2d 371, 383–84 n. 6 (4th Cir.1971) (Sobeloff, J., concurring and dissenting). *See* Section II, *infra*.

Thus, appellate counsel faced an issue only arguably preserved for appeal and of dubious legal merit. His decision not to raise such an issue cannot ground a finding of ineffective assistance. *Mendiola*.

5. *The "Estelle v. Smith" Issue.*

[22] Petitioner's next asserted ground for finding appellate counsel ineffective is

29. The quoted provision for detaining a defendant is intended as an exception to Florida's bail requirements; it is not authority for the commitment order petitioner contends the trial court was empowered to issue. *See* Author's Comment to Rule 3.210, *reprinted in*, Fla.R. Cr.P. 3.210, 33 Fla.Stat.Ann. (1975).

30. One is legally incompetent to stand trial when he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as a factual understanding of the proceeding against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960).

his failure to argue on appeal the trial court's error in allowing Dr. Robey to testify at the sentencing hearing as to Alvord's mental condition on the basis of an examination made without notice to defense counsel and in violation of petitioner's fifth and fourteenth amendment privilege.[31] The Supreme Court held in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), that introduction of a court-appointed psychiatrist's testimony to prove a capital defendant's future dangerousness, based on information gleaned from a custodial examination of the accused who neither requested the examination nor introduced psychiatric evidence on the issue and who was not warned of his right to remain silent and that any statement he made could be used against him at sentencing, violated the rule of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The *Smith* court also held that the accused's sixth amendment right to counsel was infringed because defense counsel was given no notice of the psychiatric examination. Finally, the *Smith* decision is to be retroactively applied. *Battie v. Estelle*, 655 F.2d 692 (5th Cir.1981).[32]

Because the *Smith* issue arises in the posture of an ineffective assistance claim, this Court must decide whether counsel is to be charged with anticipating *Smith*'s holding some six or seven years before the decision was rendered. *See Proffitt v. Wainwright*, 685 F.2d at 1248. The question is close. The opinion in *Battie* includes the familiar retroactivity analysis, and contains the Fifth Circuit's conclusion that "*Smith* did not establish a new principle of constitutional law because that decision merely applied already fixed principles to a new factual situation." *Id.* at 699. On the other hand, the Fifth Circuit declined to "fault" counsel for not anticipating the court of appeals' decision in *Smith*, 602 F.2d 694, and therefore found effective assistance of counsel in *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982). *See also Sullivan*, 695 F.2d at 1309. Moreover, Mr. Seymour faced the then-recent decision in *Parkin v. State*, 238 So.2d 817 (Fla.1970), a case that could easily lead reasonable counsel to conclude that the Florida Supreme Court would not favorably receive a *Miranda* and sixth amendment attack on Dr. Robey's first examination of Alvord.

Several aspects of this case also indicate that Mr. Seymour cannot be faulted for not raising a *Smith* point on appeal. First, trial counsel failed to object to Dr. Robey's arguably *Smith*-violative testimony that petitioner would be dangerous to women in the future and that he was sane at the time of the Florida crimes. Trial Rec. at 1171–72, 1178–79.[33] Second, and more fundamentally, the *Smith* issue would not necessarily have succeeded on appeal. In *Smith* the psychiatrist who examined the accused, Dr. Grigson, testified on the basis of that examination alone. Thus, there was no question that his conclusions on future dangerousness were based on statements made during a custodial examination without prior *Miranda* warnings or notice to counsel. Mr. Seymour faced quite a different circumstance: Dr. Robey had supervised Alvord's treatment for years prior to his escape in Michigan, and his contemporaneous examination of Alvord was in two sessions, the latter of which—on the specific question of petitioner's sanity at the time of the offense—was apparently in substantial compliance with the dictates in *Smith*. His testimony was therefore not based entirely, and may not have been based at all, on the first custodial examination.[34] Finally, the

31. In discussing this asserted failing of appellate counsel, the Court will limit itself to counsel's failure to raise the *Miranda* violation. The next subsection of this Opinion involves Mr. Seymour's failure to attack on appeal the admission of certain factual information through Dr. Robey. *See* section IV, *infra*, on the substantive *Miranda* attack.

32. Petitioner does not assert *Smith* as an independent ground for granting habeas relief in this case.

33. Mr. Meyers did object to the lack of notice at the January 4, 1974 competency hearing.

34. This Court does not hold that *Smith* was followed in this case; that issue is not presented by this petition and is therefore not before the Court.



record indicates unequivocally that Mr. Meyers was eager for Dr. Robey to examine his client. Meyers Depo. at 31.

In light of the problematic issue whether counsel is to be charged with foretelling *Smith*'s rule, the trial attorney's failure to object to the questionable testimony, and the uncertain potential success of a *Smith* issue on appeal, this Court cannot conclude that Mr. Seymour rendered ineffective assistance in failing to raise the point.

6. *Prior Crimes and Charges.*

Finally, petitioner contends that Mr. Seymour should have raised the trial court's error in admitting Dr. Robey's testimony concerning two prior crimes of which Alvord had apparently been convicted and concerning the kidnapping and rape charge of which Alvord had been found not guilty by reason of insanity in Michigan. The capital punishment statute in effect in Florida at the time Mr. Seymour took this appeal provided that "evidence may be presented [at the sentencing hearing] as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated" elsewhere in the statute. Fla.Stat. § 921.141(1) (1973). The enumerated aggravating circumstances included the fact that "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." *Id.* § 921.141(5)(b). The mitigating circumstances, on the other hand, included the facts that "the defendant has no significant history of prior criminal activity," *id.* § 921.141(6)(a), that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," *id.* § 921.141(6)(b), and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." *Id.* § 921.141(6)(f).

Dr. Robey testified at sentencing to several matters now relevant. He stated that the last two quoted mitigating factors, extreme disturbance in subsection (b) and lack of capacity in subsection (f), existed in Alvord's case. Trial Rec. at 1178, 1188–89. He described the circumstances surrounding the kidnapping and rape of which Alvord had been found not guilty by reason of insanity, *id.* at 1148–56, and stated his opinion that Alvord was sane under M'Naghten at the time of those crimes. *Id.* at 1156–60. He testified that Alvord had twice been convicted of crimes in Michigan, once for malicious destruction of property and the other for reckless driving. *Id.* at 1165–67. Mr. Meyers objected to the doctor's testimony concerning the Michigan crimes, stating that his client had not been convicted of the kidnap and rape and that testimony about the other two crimes was hearsay.

[23, 24] Petitioner now raises several legal attacks on the admissibility of this testimony which he contends counsel should have pressed on direct appeal. First, he says the information conveyed by Dr. Robey was within the psychiatrist-patient privilege codified at that time at Fla.Stat. § 90.242 (1973). The short answer is that the trial court took considerable care to ensure that Dr. Robey testified only to matters surrounding the Michigan crimes of which he had knowledge independent of communications from Alvord. Next, petitioner cites *Parkin* as grounding a possible argument on appeal. *Parkin*, decided over a decade before *Smith*, held that the fifth amendment rights of a criminal defendant who chooses to plead insanity were not violated when she was ordered by the trial court to cooperate with court-appointed psychiatrists. The court limited the use of such testimony: "[A]ny statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them." *Id.* at 822. The answers to petitioner's contention that Mr. Seymour should have raised *Parkin* are twofold. First, the record reflects again the care of the trial judge in limiting Dr. Robey's testimony on the Michigan crimes to

facts he knew from sources other than Alvord's statements; and second, Dr. Robey certainly did not come to know of Alvord's criminal record in the course of the custodial examination he made in January 1974, and *Parkin*'s limitations therefore would not apply. Thus, the decision not to raise these matters on appeal was a reasonable tactic.

[25] Next, petitioner contends that Mr. Seymour should have argued that introduction of evidence relating to the Michigan crimes violated Florida's capital sentence statute. First, he assertedly should have urged that evidence of the two Michigan misdemeanor convictions be excluded because they were not within the statutory aggravating circumstance requiring conviction of prior capital felony or felony "involving the use or threat of violence to the person." Fla.Stat. § 921.141(5)(b) (1973). Respondent counters by stating that evidence of these misdemeanors was relevant to rebut the statutory mitigating factor that "the defendant has no significant history of prior criminal activity." *Id.* § 921.141(6)(a).[35] Similarly, respondent states that Dr. Robey's testimony that Alvord was sane under M'Naghten at the time of the Florida crimes goes to rebut the two mitigating factors concerning mental state. *Id.* § 921.141(6)(b) and (f). Respondent's position may or may not be consistent with Florida law as it exists today, *compare Maggard v. State*, 399 So.2d 973, 977–78 (Fla.1981) *with Booker v. State*, 397 So.2d 910, 918 (Fla.1981); *see Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981), *vacated on other grounds*, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982); *Proffitt*, 685 F.2d 1266–69 (adopting *Henry*'s analysis), but Mr. Seymour certainly did not render ineffective assistance in choosing not to raise the issue at the time of the appeal.

[26] Second, petitioner asserts that Mr. Seymour should have attacked introduction of evidence relating to the Michigan kidnapping and rape, of which Alvord was found not guilty by reason of insanity. This testimony clearly should have been excluded. Alvord was not convicted of those crimes, and they were therefore not properly the subject of the sentencer's attention. Fla.Stat. § 921.141(5)(b) (1973); *Perry v. State*, 395 So.2d 170, 174–75 (Fla. 1981); *Provence v. State*, 337 So.2d 783 (Fla.1976). Mr. Seymour acted reasonably in not raising the issue on appeal, however, because the trial court did not find the aggravating circumstance of prior violent felony conviction, and was supported in his failure to find the mitigating "no significant history of prior criminal activity" by the evidence of prior misdemeanors. Trial Rec. at 97.

For the reasons stated, this Court concludes that Mr. Seymour's representation of Alvord on direct appeal was constitutionally adequate.

D. *Conclusion.*

Petitioner received constitutionally effective assistance of counsel at trial and on direct appeal. Mr. Meyers' performance fell below constitutional standards at the sentencing hearing, but petitioner was not prejudiced thereby under the standard announced in the en banc *Washington v. Strickland* decision. Petitioner is therefore not entitled to habeas relief on the ground of ineffective assistance of counsel.

## II. INADEQUATE PSYCHIATRIC EXAMINATION

Petitioner next argues, as a second independent attack on his conviction, that he received a constitutionally inadequate psychiatric examination in advance of trial.[36] The argument is based primarily on the proposition that the trial court was required under constitutional mandate to commit Alvord for observation in order to facilitate the development and presentation of an insanity defense.[37]

[27] Indigent defendants are and must be entitled to the assistance of an expert when such is necessary to their defense. *Bush v. McCollum*, 231 F.Supp. 560 (N.D. Tex.1964), *aff'd* 344 F.2d 672 (5th Cir.1965) (per curiam); *see Hoback v. Alabama*, 607 F.2d 680, 682 n. 1 (5th Cir.1979); *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir.1979). *Cf. Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Gray v. Rowley*, 604 F.2d 382 (5th Cir.1979). In *Pugh*, the earliest case on point in the Fifth Circuit, the court held that due process was violated when the defendant was convicted over an insanity plea without the assistance of a qualified psychiatrist and without expert evidence as to sanity. 231 F.Supp. at 565. Quite similarly, the court in *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981), stated that "a defendant whose sanity at the time of the alleged crime is fairly in question has *at a minimum* the constitutional right to one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available opportunity to utilize the analysis in preparation and conduct of the defense." *Id.* at 787.[38]

[28, 29] This Court agrees with Judge Edenfield's holding in *Blake*: under appropriate circumstances, a defendant must be provided a psychiatric examination when such is necessary to a reasonable investigation of an insanity defense. That rule might be extended, as petitioner contends, to require commitment upon a showing that observation in an institutionalized setting is the only way to accomplish a reasonably adequate psychiatric examination of an accused. But this case presents no such circumstances, for Alvord was examined by a thoroughly qualified psychiatrist—one whom he trusted and who possessed intimate knowledge of his psychiatric history. The fact that Dr. Robey concluded that Alvord was sane at the time of the offense is wholly insufficient to entitle the accused to another opinion. *Blake*, 513 F.Supp. at 784 (and cases cited therein). Similarly, the fact that Dr. Robey states now, some eight years later, that his examinations of Alvord were made under adverse circumstances in no way entails the conclusion that the trial court was constitutionally bound to go further than it did in providing a psychiatric examination. The state judge knew only that two psychiatrists had tried unsuccessfully to examine Alvord and had suggested commitment and that Dr. Robey had performed an examination of Alvord adequate to ground a professional opinion. The constitution was satisfied.

Accordingly, habeas relief should be denied on this ground.[39]

## III. USE OF UNDISCLOSED MATERIAL BY THE FLORIDA SUPREME COURT: THE *BROWN* ISSUE

[30] Petitioner's third ground for relief is that "the Florida Supreme Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial

35. Petitioner contends that the quoted mitigating factor is void for vagueness, citing *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (Ga.1976). The Supreme Court considered the clarity of this and other language in the Florida statute in *Proffitt v. Florida*, 428 U.S. 242, 257–58, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976), concluding that it was facially constitutional. Mr. Seymour was no doubt prescient in choosing not to raise the point.

36. This issue was discussed earlier in the context of petitioner's claim of ineffective assistance of counsel on appeal. *See* section I(C)(4), *supra*

37. Petitioner also suggests that *Pate* was violated in this case. For the reasons stated in section I(C)(4), *supra*, that argument is rejected.

38. Petitioner also relies on *United States v. Taylor*, 437 F.2d 371 (4th Cir.1971), but *Taylor* simply held that the Criminal Justice Act, 18 U.S.C.A. § 3006A (West Supp.1982), applicable to federal prosecutions, required a federal district court to appoint a psychiatrist to examine a defendant upon his request and showing of necessity, and that the statutory showing was made when the only other psychiatric opinion available was based on a "truncated" ten-minute interview.

39. The Court notes some unclarity as to whether petitioner effectively exhausted his available state remedies on this point, *see Alvord*, 396 So.2d at 191 (collateral review appeal), but need not pause on the matter in light of respondent's waiver. Answer ¶ II; *see Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. Unit B 1981); *Messelt v. Alabama*, 595 F.2d 247 (5th Cir. 1979).

and not a part of the trial record or record on appeal." Alvord cannot say whether such material was considered by the state court in deciding his appeal.

The constitutionality of the Florida court's consideration of these materials was considered and upheld in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The Eleventh Circuit has upheld the practice without condoning it. *Ford v. Strickland*, 696 F.2d 804, 809–11 (11th Cir. 1983) (en banc) (mandate stayed until March 1, 1983).

Accordingly, habeas relief on this ground should now be denied.

## IV. *MIRANDA*

[31] Petitioner next contends that *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), was violated when the officer who arrested him in Michigan was allowed to testify to Alvord's post-arrest statement, "I'm a rapist, not a . . . thief." He contends that Miranda was violated because, first, the officer "neglected to read petitioner the warnings as printed on a police department form"—the record is unclear whether the officer informed Alvord of his right to have counsel appointed if he was indigent; and second, Alvord never signed a written waiver of his fifth amendment privilege.

The officer, Detective Dufour, testified in the proffer that he told Alvord he was a police officer, that he did not have to say anything, that anything he said could later be used against him, and that he had a right to have an attorney. Trial Rec. at 921. Dufour also stated that Alvord did not request an attorney, that no one promised Alvord immunity or threatened or coerced him into making a statement, and that Alvord told him he understood his rights. *Id.* at 921–22. The detective later testified to the jury that upon being questioned about "another matter,"[40] Alvord had said, "I'm a rapist, not a . . . thief." *Id.* at 941. He described Alvord's explanation—"He said, 'I'm wanted for three murders in Florida' "—and stated that when asked whether he did it, Alvord responded "They have got to prove it." *Id.* at 942.

Introduction of this testimony did not violate *Miranda*. *See North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *see also* 28 U.S.C. § 2254(d); *Alvord*, 322 So.2d 536–38 (direct appeal). Further, no specific factual material before this Court undermines the trial court's conclusion that the statement was made voluntarily and in full compliance with due process principles.

Habeas relief is therefore denied on this ground.

## V. GENERAL ATTACKS ON THE SENTENCE OF DEATH

Petitioner next mounts several constitutional attacks on his sentence. His fifth ground for relief is that the death penalty is unconstitutional as applied in his case. To support that ground, he argues that "[d]eath sentences are imposed irregularly, unpredictably, and whimsically in cases which are no more deserving of capital punishment under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed." Petition at 27. He also contends that "[t]he theoretical justifications for capital punishment are groundless and irrational in fact." *Id.* at 28. His sixth ground is that the sentence violated the equal protection clause because it is imposed discriminatorily on the basis of sex and poverty. Ground nine also comprises an equal protection argument: Alvord contends the death penalty is imposed "arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons . . . ."[41] Finally, petitioner's seventh and eighth grounds are, respectively, that the potential for capital punishment is used in Florida to coerce guilty pleas from those accused of murder and that the death penalty was "too great" in this case.

Each of these arguments was resolved in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978). First, the *Spinkellink* court read several modern Supreme Court decisions on the death penalty to hold that

> capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute—and there can be no doubt that Florida has—which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] have been conclusively removed.

*Id.* at 605 (footnote omitted).[42] Petitioner's charge of discrimination on the basis of race, sex, and poverty was put to rest. *Spinkellink*, 578 F.2d at 616; *see Smith v. Balkcom*, 660 F.2d 573, 584–85 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir.1982), and the *Spinkellink* court similarly held that petitioner's inducement of guilty pleas argument is without merit. 578 F.2d at 606–09.

[32] Petitioner lastly contends that the death penalty was "too great" in his case. Essentially, petitioner asks this Court to review the many past Florida capital sentence appeals to determine whether this sentence of death is consistent with those decisions. But it is "not necessary for [a] district court to undertake such a case-by-case comparison." *Id.* at 604. The Court need only conclude that Florida's statutory capital sentence procedure is facially constitutional, *Proffitt*, and was followed in this case. But for the specific flaw noted in section VII, *infra*, this Court so concludes.

Habeas relief should be denied on grounds six through nine of the petition.

## VI. THE "DEATH-PRONE" JUROR

[33] In his tenth ground for relief, petitioner argues that the trial court violated the requirements of the sixth, eighth, and fourteenth amendments by refusing to excuse for cause a venireman who stated his view at voir dire that any person convicted of first degree murder should be sentenced to die. Trial Rec. at 315.[43] In denying the defense challenge, the trial judge stated that "it takes a majority of the verdict on the second stage of the trial for a recommendation," and that the venireman had not "said he is biased as far as the finding of any guilt or innocense is concerned." *Id.* at 315–16. The defense later excused the juror peremptorily. *Id.* at 401.

Respondent apparently understands petitioner to argue that *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), was violated by the trial court's failure to excuse the juror. But the specific dictate of *Witherspoon* was clearly not violated here: no venireman was excused for cause on the basis of a generalized objection

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40. The trial court was properly careful not to let in evidence concerning this "other matter."

Trial Rec. at 925–27.

41. Petitioner also finds a constitutional basis for this contention in the eighth amendment and the due process clause of the fourteenth amendment. Petition at 29.

42. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

43. Respondent argues that this issue amounts to a "question of law which has been resolved adversely to petitioner and therefore requires no further hearing." Answer to Petition at 26. But applying federal constitutional law to the historical facts of the case is precisely the function of a federal court in ruling on a petition for habeas corpus. 28 U.S.C. § 2254(a); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981).

to the death penalty. *Witherspoon* did follow what has long been the law, however, in stating that an accused has a right to an impartial jury and that a capital sentence imposed by a "hanging jury" violates fundamental constitutional principles. 391 U.S. at 523, 88 S.Ct. at 1778. This is all the more true in light of recent capital punishment decisions of the Supreme Court, which require that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932. Florida's statute provides such suitable direction, *Proffitt*, 428 U.S. at 259–60, 96 S.Ct. at 2970, but the views of the juror in question here replace that discretion by a mandatory death sentence.

[34] A venireman who believes that the death penalty should automatically and in every case flow from conviction of first degree murder must be excused. *See Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919); *Crawford v. Bounds*, 395 F.2d 297 (4th Cir.1968), *cert. denied*, 397 U.S. 936, 90 S.Ct. 941, 25 L.Ed.2d 117 (1970). In this case, the trial court's error in refusing to excuse such a venireman for cause forced petitioner to expend one of his allotted peremptory challenges to excuse the individual from serving on the jury. But the record reflects and petitioner concedes that he did not exhaust his peremptory challenges. Petitioner's Memorandum, November 1, 1982. *See* Fla. R.Crim.P. 3.350 (ten peremptory challenges allowed in capital case). Petitioner was therefore in no way prejudiced by the trial court's error in not excusing the jury for cause. *See Stroud*.

Relief must therefore be denied on this ground.

## VII. UNFETTERED SENTENCING DISCRETION AND NONSTATUTORY AGGRAVATING FACTORS

[35] Petitioner's eleventh ground for relief raises several attacks on his sentence and the findings upon which it was based. His first attack is easily met. Petitioner contends that his sentence was unconstitutional because "[n]one of aggravating circumstances found to support the death sentence was alleged in the indictment . . . ." Petition at 31. Mr. Meyers moved to dismiss the indictment on March 28, 1974, Trial Rec. at 78, but this untimely motion apparently did not raise the claim now asserted. The claim is therefore arguably waived. *Wainwright v. Sykes*. *But see* Respondent's Answer ¶ II; *Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. Unit B 1981). Even assuming this argument is properly presented, petitioner has cited no decision holding that such an enumeration of aggravating circumstances is required. *See Spinkellink*, 578 F.2d at 609. In light of this absence of authority and considering the limited number of aggravating circumstances available to the prosecution in Florida, Fla.Stat. § 921.141(5) (1973), the Court finds petitioner's argument to be without merit.

[36] Petitioner's third attack also fails. He contends that "[n]one of the aggravating circumstances used to support the death sentence was found to exist beyond a reasonable doubt . . . ." Petition at 32. The jury was properly instructed. Trial Rec. at 1230.

[37] Petitioner's major argument is that his sentence was unconstitutional because the sentencer was allowed to consider, and actually relied in part upon nonstatutory aggravating circumstances. It cannot be disputed that evidence concerning Alvord's potential for dangerousness in the future was allowed in at the sentencing hearing through the testimony of Dr. Robey. *See* section I(B), *supra*. The sentencing judge properly instructed the jury that it could consider only those aggravating factors listed in the statute. Trial Rec. at 1227. The findings entered by the judge, however, included this statement: "The Court finds that based on all the facts and circumstances presented the defendant, [Alvord], has been and would continue to be a danger and



a menace to society and therefore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida." Trial Rec. at 99. The quoted sentence does not appear among the four findings listed by the judge as aggravating circumstances, nor does it appear among the eight findings listed in mitigation; instead, it comprises the concluding sentence of the order.

The Courts of Appeals for the Fifth and Eleventh Circuits have held squarely that a death sentence is unconstitutional if based on evidence of findings of aggravating circumstances not included among those listed in the Florida statute. *Proffitt*, 685 F.2d at 1266–69; *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.), *vacated on other grounds*, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982) (adopted in *Proffitt*). A defendant's potential for dangerousness in the future is not a statutory aggravating factor in Florida.[44] *See* Fla.Stat. § 921.141(5). *Cf. Smith*, 101 S.Ct. at 1870 (considering Texas statute, which includes future dangerousness as aggravating circumstances). Indeed, the *Proffitt* court held the death sentence in that case unconstitutional precisely because the sentencing judge had included among his findings the statement that Proffitt was a "danger and a menace to society":

> In considering [*Proffitt's*] 'propensity to commit [murder]' and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted his own judgment of what circumstances justify capital punishment for that of the Florida legislature. In so doing, the trial judge not only committed error under the state law; he also exceeded the federal constitutional limitations imposed by *Furman* on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner.

685 F.2d at 1267 (citation omitted).

This case is indistinguishable from *Proffitt* in this regard. In both cases, the state introduced evidence at the sentencing phase relating to the defendant's potential for dangerousness in the future, see 685 F.2d at 1267 n. 61, and in both cases the jury was correctly instructed to consider only statutory aggravating circumstances. *Id.* at 1267. The only possible difference is that the sentencing judge in *Proffitt* presumably included future dangerousness among his express findings of aggravating factors, while Alvord's sentencer stated his reliance on that nonstatutory factor in the closing sentence of his order. This Court cannot conclude from the textual placement of the trial judge's finding of future dangerousness that the nonstatutory finding was not considered in imposing the death sentence, for to so conclude would hazard an unnecessary risk that the death sentence in this case was imposed on the basis of considerations made impermissible by the Florida Legislature.[45] Alvord's sentence cannot stand.

44. The only statutory aggravating circumstance that might conceivably apply is that "[t]he defendant knowingly created a great risk of death to many persons." That factor, which was found to exist in this case, relates to the character of the offense, not of the accused.

Respondent insists that the finding of future dangerousness did not relate to a nonstatutory aggravating factor, but rather negated a mitigating circumstance. It does not state what statutory mitigating factor the finding might possibly negate, nor does it cite authority in support of this bootstrapping argument.

45. In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Supreme Court was invited to ignore a sentencing judge's offhand remark to the effect that he was not permitted by statute to consider nonstatutory mitigating factors. In line with its holding in *Lockett*, the Court remanded to allow the state courts to "consider all relevant mitigating evidence." 102 S.Ct. at 877. "Although one can reasonably argue that these extemporaneous remarks are of no legal significance. . . . *Lockett* compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* at 878 (O'Conner, J., concurring) (quoting *Lockett*, 438 U.S. at 605, 98 S.Ct. at 2965).

This case mirrors *Eddings* in that nonstatutory aggravating circumstances were considered in imposing the death penalty, but the risk in assuming proper consideration by the sentencing judge is precisely the same.

### VIII. *LOCKETT*: RESTRICTION OF MITIGATING CIRCUMSTANCES

Petitioner's final claim, number twelve, is that the sentencing jury was impermissibly precluded from considering mitigating circumstances other than those listed in section 921.141(5), Fla.Stat. Alvord does not contend that he was prevented from introducing evidence at the sentencing of nonstatutory mitigating factors. Rather, he contends that the advisory jury was prevented from considering nonstatutory mitigating circumstances by the terms of the sentencing court's instructions. Respondent is apparently satisfied to note that no restrictions were placed on petitioner's right to present evidence to the jury. Answer to Petition at 28.

Petitioner's evidence of nonstatutory mitigating circumstances was notably sparse in this case. The major part of Dr. Robey's testimony concerned Alvord's history of mental illness and his mental state at the time of the offense in question. This information is relevant to the two psychiatric mitigating circumstances listed in Florida's statute. *See* Fla.Stat. § 921.141(6)(b) and (f).[46] He did unquestionably state one extremely important opinion: that Alvord could be rehabilitated with proper treatment. Trial Rec. at 1191–92. He also testified that petitioner was married and a father. Neither the defendant's potential for rehabilitation nor his family circumstance is among the statutory mitigating factors.

In his instructions, the sentencing judge stated to the jury that "[t]he aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence." *Id.* at 1227. After listing the statutory aggravating circumstances, the judge continued:

> If you do not find that there existed any of the aggravating circumstances which has [sic] been described to you, it would be your duty to recommend a sentence to life imprisonment. Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.
>
> The mitigating circumstances which you may consider if established by the evidence are these:

and proceeded to list the statutory mitigating factors. *Id.* at 1228–29. A few moments later, the judge instructed the jury that

> "[i]f one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed."

*Id.* at 1230.[47]

[38] The death penalty cannot constitutionally be imposed on the basis of a statute or instructions that prevent the sentencer from considering nonstatutory mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 596, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978) (plurality); *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978) (plurality). The Fifth and Eleventh Circuits have interpreted *Lockett* several times. In *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir.1978), the court read *Lockett* and *Bell* "to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death." *Id.* at 448.[48] Thus, *Lockett*

46. Dr. Robey's conclusion that Alvord was sane under M'Naghten at the time of the Florida crimes is arguably evidence of a nonstatutory mitigating circumstance in light of the difference between the M'Naghten standard and the tests stated in subsections 921.141(6)(b) and (f), Fla.Stat.

47. Mr. Meyers did not object to the sentencing instructions. Respondent has waived any possible exhaustion argument that might flow from that fact, however. *See* Answer to Petition ¶ 3. *Cf. Ford*, 696 F.2d at 812.

48. The *Chenault* court did not consider the merits of Chenault's *Lockett* claim because he had not exhausted state remedies on the issue. 581 F.2d at 447. It did hold, however, that the *Lockett* argument presented by Chenault "is violated not only by the exclusion of evidence relating to nonstatutory mitigating factors, but by instructions that limit "the sentencer's consideration of that evidence except as if related to the statutory mitigating factors." *Washington v. Watkins*, 655 F.2d 1346, 1375 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).



The Fifth Circuit has at least twice faced glaring violations of *Lockett*. In *Watkins*, the sentencing jury was instructed to consider "only" certain enumerated aggravating factors; it was then told to "consider the following elements of mitigation," whereupon the judge listed only two of the several statutory mitigating circumstances. The Fifth Circuit read these instructions to limit the jury's consideration of nonstatutory mitigating factors, and concluded that the charge was not saved by the trial judge's statement to the jury that "[i]n reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." *Id.* at 1369. In *Spivey v. Zant*, 661 F.2d 464 (5th Cir. Unit B 1981), decided only one month after *Watkins*, the court faced a similarly glaring *Lockett* violation: the trial judge's instructions contained express mention of aggravating factors only. Circumstances in mitigation were noted only implicitly when the court told the jury to "consider all the evidence" in reaching a sentencing decision. The Fifth Circuit held that a jury must "receive clear instructions which not only do not preclude consideration of mitigating factors, *Lockett*, but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . .'" *Id.* at 471 (quoting *Jurek*, 428 U.S. at 274, 96 S.Ct. at 2957). It concluded that the instructions at issue were constitutionally inadequate for their failure to "describe the nature and function of mitigating circumstances," or guide the jury "toward the consideration of mitigating circumstances by special interrogatories." *Id.* at 472.

More recently, however, the Eleventh Circuit has faced a *Lockett* argument attacking jury instructions essentially identical to those in this case. In *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), the trial judge instructed the jury to consider "only" the statutory aggravating circumstances and "to consider the following" mitigating circumstances. 696 F.2d at 812. He listed all statutory aggravating and mitigating circumstances. Thus, the word "only" distinguished the instructions on aggravating factors from those on mitigating factors.

[39] The *Ford* court upheld the instructions after noting that its task was to "determine the interpretation a reasonable juror might give the words of the instruction in question." *Id.* (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979)). This Court is led by *Ford* to the same result. First, the trial court's omission of the word "only" in listing the mitigating circumstances indicated to the jury that they might consider factors other than those listed by the judge in mitigation of sentence. *See Ford*, 696 F.2d at 812. Second, the instructions included a list of all statutory mitigating factors and did not limit the jury to considering only those listed. *See Id.* at 812–13; *cf. Washington v. Watkins*, 655 F.2d at 1368. Third, petitioner was permitted to introduce evidence freely, without limitation to that relevant to a statutory mitigating factor. *See Ford*, 696 F.2d at 813. Fourth and finally, the sentencing judge's order refers to "any circumstances which would mitigate the sentence in this case." *See Id.*

"Under these circumstances, a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating evidence." *Id.* Relief on this ground is denied.

### IX. CONCLUSION

Petitioner's several claims challenging the constitutionality of his conviction are

> plicate[d] a substantial denial of a federal constitutional right." *Id.* at 448.

without merit, and habeas relief on those grounds is hereby DENIED. For the reasons stated in section VII of this Opinion, however, petitioner's death sentence must be set aside. In the absence of either party's timely filed notice of appeal, the state of Florida is hereby DIRECTED to conduct a new sentencing hearing within a reasonable time and in the manner provided by section 921.141, Fla.Stat. If no notice of appeal is filed and the State fails to hold another sentencing hearing within a reasonable time, the State is ORDERED to vacate petitioner's sentence and to impose a sentence less than death in accordance with state law. *See* Fla.Stat. § 775.082.

ORDER

On Motion to Alter or Amend Judgment

The Court has for consideration a motion to alter or amend judgment, filed by respondent pursuant to Rule 29, Fed.R.Civ.P. Rule 11, 28 U.S.C. foll. § 2254. The motion is procedurally proper, *see Browder v. Director, Department of Corrections*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978), was timely filed, and has drawn response from petitioner.

Respondent seeks reconsideration of that portion of this Court's March 23, 1983 Memorandum Opinion that set aside petitioner's death sentence and required a new sentencing hearing. Respondent's first argument is ironic in light of the vigor with which he resisted the assertedly improper evidentiary hearing held in this case, *see In re Wainwright*, 678 F.2d 951 (11th Cir.1982) (denying petition for writ of prohibition), he contends that this Court should "reserve ruling" on the instant motion pending decision in *Barclay v. Florida*, 411 So.2d 1310 (Fla.1981), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d 382 (1982), and *Zant v. Stephens*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982) (certifying question to Georgia Supreme Court). Secondly, he argues that *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), does not require that Alvord's sentence be set aside.

The Court will consider respondent's second argument first. In *Proffitt*, the Eleventh Circuit overturned a death sentence on precisely the ground involved in this case: by considering Proffitt's potential for dangerousness in the future, the sentencing judge had "exceeded the federal constitutional limitations imposed by *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner." 685 F.2d at 1267. Having already determined that two other aggravating factors relied upon by the sentencing judge were unconstitutional under *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the *Proffitt* court was faced with one valid aggravating factor remaining and no clear finding of mitigating circumstances. 685 F.2d at 1268. Fully recognizing the *Zant* case, it refused to deem the trial court's consideration of nonstatutory aggravating circumstances harmless error even in the absence of mitigating circumstances against which the remaining aggravating factor might come up short: "Only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error." *Id.* at 1269 & n. 64. This case presents facts even less conducive to a finding of harmless error than were present in *Proffitt*, for there remain in this case several mitigating circumstances to be weighed against such valid aggravating factors as remain for consideration.[1]

Several months after *Proffitt*, the en banc Eleventh Circuit decided *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983). In *Ford*, the Florida Supreme Court had invalidated three of the eight aggravating factors found to exist by the sentencing judge: two were supported by insufficient evidence, and one was based on the same aspect of the crime as another aggravating factor. *Ford v. State*, 374 So.2d 496, 501–03 (Fla.1979). The Eleventh Circuit faced the question whether the Florida Supreme Court erred in failing to require resentencing in these circumstances. In its brief per curiam opinion, the en banc court affirmed denial of relief on this ground, but remanded this aspect of the petition to the district court for further proceedings in light of the eventual decision in *Barclay*. A majority of the judges recognized in their various separate opinions, however, that the court's decision to impose a harmless error rule and to remand in anticipation of *Barclay* depended on the fact that the error found to exist in the sentencing proceedings was of state law only; had the sentencer heard evidence it was constitutionally prohibited from hearing or relied upon nonstatutory aggravating circumstances that were foreclosed by *Proffitt* and *Furman*, the sentence would have been set aside. 696 F.2d at 814 (Roney, J., with whom four judges joined); 696 F.2d at 824 (Godbold, J., with whom Judge Clark joined). *See Henry v. Wainwright*, 661 F.2d 56, 59–60 (5th Cir.1981), *vacated and remanded on other grounds*, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326, *judgment reinstated*, 686 F.2d 311 (5th Cir.1982).

A post-*Furman* capital sentencing statute structured as Florida's requires the sentencing body to weigh those statutory aggravating factors it finds to exist against whatever circumstances it finds in mitigation. This decisional mechanism has been upheld under the Eighth Amendment as a rational means of assuring "that the death penalty will not be imposed in an arbitrary or capricious manner." *Proffitt v. Florida*, 428 U.S. 242, 252–53, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). The difference between the errors in *Ford* on the one hand and in *Proffitt v. Wainwright*, *Henry*, and this case on the other is that between state-law errors within the constitutionally mandated structure and errors of constitutional dimension that infect that structure. The Supreme Court's opinion certifying a question in *Zant* suggests that a state appellate court may in some circumstances impose a harmless error rule without doing violence to its constitutional role in the capital sentencing structure. But that is not to say that a federal court may overlook infectious error of a constitutional magnitude, for such error draws into question the structure itself.

Finally, the Eleventh Circuit very recently decided *Goode v. Wainwright*, 704 F.2d 593 (11th Cir.1983). *Goode* involved precisely the issue now before this Court, and the Goode court distinguished *Ford* and declined to await decision in *Barclay* and *Zant* for just the reasons stated in this Order. *Id.*, at 612.

Accordingly, respondent's motion to alter judgment should be, and it is hereby DENIED.

IT IS SO ORDERED at Tampa, Florida this 5 day of May, 1983.

1. The pendency of a petition for rehearing en banc in *Proffitt* does not persuade this Court to ignore the precedential weight of that decision.



KEYNUMBER SYSTEM

ITALIA DI NAVIGAZIONE, S.p.A., Plaintiff,

v.

M.V. HERMES I, her engines, boilers, tackle, etc., and Hermes Shipping K.K., a/k/a Hermes Shipping Co., Ltd., Defendants.

No. 82 Civ. 1168 (RWS).

United States District Court, S.D. New York.

March 25, 1983.

Charterer of vessel brought action against owner of the vessel seeking damages for the alleged nondelivery of certain items shipped aboard the vessel. On owner's motion for summary judgment, the District Court, Robert W. Sweet, J., held that: (1) charterer of vessel, as assignee of claims of shipper against owner of the vessel for

APPENDIX B



this order. The mandate will be re-issued forthwith.

Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Vencsel, Petitioner-Appellee, Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, Respondent-Appellant, Cross-Appellee.

No. 83-3345.

United States Court of Appeals, Eleventh Circuit.

Feb. 10, 1984.

Secretary of the Florida Department of Corrections appealed from an order of the United States District Court for the Middle District of Florida, Ben Krentzman, J., 564 F.Supp. 459, holding invalid sentence of death and granting petitioner writ of habeas corpus subject to State's holding a new sentencing hearing. Petitioner cross-appealed from denial of writ on other grounds raised in petition. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) order of district court granting writ of habeas corpus because of trial judge's reliance on nonstatutory factor of future dangerousness would be reversed since any reliance by trial judge on propensity to commit violent crimes in the future did not constitute constitutional error; (2) petitioner received effective assistance of counsel at trial; (3) appellate counsel did not render ineffective assistance of counsel; (4) petitioner's incriminating statements made to arresting police officer at time of arrest were properly admitted; and (5) Florida was not required to conduct proportionality review.

Reversed in part and affirmed in part.

1. Habeas Corpus ⇐113(13)

Order of district court granting death row inmate writ of habeas corpus because of trial judge's reliance on nonstatutory factor of future dangerousness would be reversed since any reliance by trial judge on inmate's propensity to commit violent crimes in the future did not constitute constitutional error.

2. Habeas Corpus ⇐85.4(2)

In habeas corpus proceeding, claim of ineffective assistance of counsel must be proved by a preponderance of the evidence.

3. Criminal Law ⇐641.13(6)

Counsel has duty to conduct reasonable investigation of possibility of an insanity defense where defendant has a demonstrated history of mental illness.

4. Criminal Law ⇐641.13(2)

Where two psychiatrists testified to defendant's competency to stand trial, and defense attorney made reasonable effort to convince trial judge to rule defendant, who had a long history of mental illness, incompetent, defense attorney's failure to raise insanity defense at trial, in accordance with wishes of defendant, was not ineffective assistance of counsel.

5. Criminal Law ⇐641.13(2)

In view of overwhelming proof of guilt, defense attorney's closing argument in capital murder prosecution, in which attorney made lengthy argument describing horrible circumstances of an execution and defendant's inability to conform his conduct to society's dictates, and in which attorney also noted that judge could put defendant in jail for life, thus rebutting any argument that defendant could kill again, was not constitutionally ineffective.

6. Criminal Law ⇐1166.11

Where defendant offered at neither state nor federal habeas evidentiary hearings evidence that defense attorney allegedly could have produced had he conducted an investigation of defendant's extensive history of mental illness and called other witnesses; nor did defendant explain how de-

fense attorney could more effectively have cross-examined psychiatrist who testified that defendant was competent to stand trial, defendant was not prejudiced by any ineffective assistance of counsel.

**7. Criminal Law ⇐641.13(7)**

A defendant has the right to effective counsel on appeal.

**8. Criminal Law ⇐641.13(7)**

Counsel's failure to advance errors on appeal later gaining "judicial recognition" does not constitute unconstitutional aid.

**9. Criminal Law ⇐641.13(7)**

Counsel need not brief issues on appeal reasonably considered to be without merit.

**10. Criminal Law ⇐641.13(7)**

In view of fact that trial judge, as a matter of Florida law, need not have given presumption of insanity instruction that was never requested, failure of appellate counsel to assert as error failure of trial judge sua sponte to so charge jury was not ineffective assistance of counsel.

**11. Criminal Law ⇐641.13(7)**

In view of fact that question whether defendant decided to accept attorney as his defense counsel at trial was clearly a question of historical fact, meriting deference to state court's finding that defendant ultimately consented to being represented by attorney, failure of appellate counsel to assert that trial judge erred by not appointing different counsel at request of defendant was not ineffective of assistance of counsel.

**12. Criminal Law ⇐641.13(7)**

Failure of appellate counsel to anticipate retroactive application of judicial rule barring expert testimony based on statements made during a custodial examination without prior *Miranda* warnings or notice to counsel and raise such issue on appeal did not constitute ineffective assistance of counsel.

**13. Criminal Law ⇐641.13(7)**

Appellate counsel's failure to raise issues of admissibility, under Florida sentencing statute, of examining psychiatrist's testimony concerning defendant's Michigan felonies, for which defendant had been found not guilty by reason of insanity, or of psychiatrist-patient privilege did not constitute ineffective assistance of counsel given Florida's wide-open rule of admissibility at penalty hearings and trial court's considerable care in insuring that psychiatrist testified only to matters surrounding Michigan crimes of which he had knowledge independent of communications from defendant. West's F.S.A. §§ 921.141, 921.141(6)(a, f); F.S.1973, § 90.242.

**14. Constitutional Law ⇐268.2(2)**

Conviction of a legally incompetent defendant violates due process. U.S.C.A. Const.Amends. 5, 14.

**15. Criminal Law ⇐625**

State afforded defendant charged with first-degree murder an adequate competency hearing, despite assertion that examination defendant received was grossly inadequate because of poor conditions and lack of time spent together by examining psychiatrist and defendant.

**16. Criminal Law ⇐412.2(3)**

Arresting officer's failure to advise defendant of right to have appointed counsel did not render defendant's incriminating statements inadmissible.

**17. Criminal Law ⇐412.2(5)**

Arresting officer's failure to obtain written waiver of rights from defendant did not render defendant's incriminating statements inadmissible.

**18. Habeas Corpus ⇐85.5(1)**

District court properly rejected assertion in habeas corpus proceeding that defendant's incriminating statement to arresting police officer was involuntary and should not have been admitted in capital murder prosecution because he lacked capacity to understand what he was saying in view of substantial evidence of defendant's competency and of voluntary nature of confession before state trial judge. 28 U.S.C.A. § 2254(d).



**19. Homicide ⇐311**

Jury at sentencing hearing in first-degree murder prosecution was not impermissibly precluded from considering, as a mitigating factor, any aspect of defendant's character or record or any circumstance of offense that defendant proffered as a basis for a sentence less than death by instruction to jury that "mitigating circumstances which you may consider if established by the evidence are these * * *," followed by listing of statutory mitigating circumstances.

**20. Criminal Law ⇐1208.1(4)**

In view of Florida sentencing system's requirement that "special circumstances" must be found before sentence of death may be imposed in a given case and of other checks on discretion of sentencing authority, Florida was not required to conduct proportionality review.

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Ann Garrison Paschall, Asst. Atty. Gen., Tampa, Fla., for Wainwright.

William J. Sheppard, Elizabeth L. White, Steven Malone, Courtney Johnson, Jacksonville, Fla., for Alvord.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL and FAY, Circuit Judges, and ALLGOOD *, District Judge.

JAMES C. HILL, Circuit Judge:

Louie L. Wainwright, Secretary of the Florida Department of Corrections, appeals to this court from the order of the district court holding invalid Gary Eldon Alvord's sentence of death and granting Alvord the writ of habeas corpus subject to the state's holding a new sentencing hearing. Alvord cross-appeals from the district court's denial of the writ on the other grounds raised in his petition. The Supreme Court's recent decision in *Wainwright v. Goode*, — U.S. —, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), mandates reversal of the portion of the district court's order granting the writ; we affirm the district court on all other grounds.

In 1974, Alvord was indicted, tried, convicted, and sentenced to death in Hillsborough County, Florida on three counts of murder in the first degree. The Florida Supreme Court affirmed Alvord's convictions and sentence, *see Alvord v. State*, 322 So.2d 533 (Fla.1975), and the United States Supreme Court denied certiorari, *see Alvord v. Florida*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Alvord then filed a motion for reduction of sentence under Florida Rule of Criminal Procedure 3.800(b); the state court denied the motion, and the Florida Supreme Court refused a petition for a writ of mandamus in 1977. In 1978, Alvord filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850; the state court denied the motion, and the Florida Supreme Court affirmed. *See Alvord v. State*, 396 So.2d 184 (Fla.1981). Alvord filed this case in federal district court in 1981. The district court, 564 F.Supp. 459, granted the above-described partial relief, and both parties appealed.

## I. RELIANCE ON NONSTATUTORY AGGRAVATING CIRCUMSTANCE

At Alvord's trial, the sentencing judge, after finding four statutory aggravating factors to be present, concluded his order imposing the death penalty by stating that Alvord "has been and [will] continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida." The district court concluded that this statement demonstrates that the sentencing judge relied on a nonstatutory aggravating circumstance, *see Miller v. State*, 373 So.2d 882 (Fla.1979) (future dangerousness not a statutory aggravating factor), and, as dictated by our opinion in *Goode v. Wainwright*, 704 F.2d

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

583, 612 (11th Cir.1983), held Alvord's death sentence constitutionally invalid. The Supreme Court recently reversed *Goode*, *see Wainwright v. Goode*, — U.S. —, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), and the state contends that the Supreme Court's decision requires us to reverse the district court. Alvord argues that constitutionally-based distinctions require a different result in this case than the result reached by the Supreme Court in both *W. ainwright v. Goode* and *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).[1]

This case is the latest of several cases, including *Goode*, in which this court has addressed this issue. *See, e.g., Proffitt v. Wainwright*, 685 F.2d 1227, 1256–69 (11th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *modified*, 648 F.2d 446 (5th Cir.1980), *rev'd and remanded*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), *on remand*, 716 F.2d 276 (5th Cir.1983); *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. Unit B 1981) (*Henry I*), *vacated and remanded*, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), *judgment reinstated*, 686 F.2d 311 (5th Cir. Unit B 1982) (*Henry II*), *vacated and remanded*, — U.S. —, 103 S.Ct. 3566, 77 L.Ed.2d 1407 (1983), *prior judgment reversed*, 721 F.2d 990 (5th Cir. Unit B 1983) (*Henry III*). A review of these cases and of the Supreme Court's decision in *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), leads us to the conclusion that any reliance by the trial judge on Alvord's propensity to commit violent crimes in the future does not constitute constitutional error.

Alvord's first argument (raised in his brief before the Supreme Court decided *Goode*) is that *Proffitt* requires this court to invalidate his sentence.[2] *Proffitt*, 685 F.2d at 1266–69, would seem to mandate such a result. The Supreme Court's decisions in *Goode* and *Barclay*, however, invalidate the reasoning relevant to our decision in this case set forth in that opinion.[3] In *Goode*, the Supreme Court gave three alternative reasons for its reversal of our decision. First, stated the Court, if reliance on a nonstatutory factor presents a question of law, we should not have displaced the Florida Supreme Court's resolution of an issue of state law. — U.S. at — — —, 104 S.Ct. at 382. Second, if the reliance presents an issue of fact, we failed adequately to defer to a state finding of fact under 28 U.S.C. § 2254(d) (1976). *Id.* at —, 104 S.Ct. at 382. Third, even if the sentencing judge relied on a factor "unavailable to him under state law," this reliance, given the review by the Florida Supreme Court, did not render Goode's sentencing unconstitutional. *Id.* The Court noted that there "is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness." *Id.*

We see no possible distinctions indicating that *Proffitt*, not *Goode*, would control this case. The existence of mitigating circumstances no longer is of importance. We

1. The state argues on appeal only that *Barclay* and *Goode* allow the sentencing judge to rely on the nonstatutory factor in this case and does not contend that the failure of the trial judge affirmatively to find future dangerousness as an aggravating factor when listing the four (other) aggravating factors indicates that the trial judge did not rely on future dangerousness as a factor. We will assume for purposes of this opinion that the state judge relied on future dangerousness as a separate and distinct factor.

2. We realize that the Supreme Court denied certiorari in *Proffitt*, *see* — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697; however, the denial of certiorari has no precedential effect. In *Proffitt*, we found other constitutional inadequacies in the sentencing hearing. *See* 685 F.2d at 1251–1265 (confrontation clause violation, *Godfrey v. Georgia* invalid statutory aggravating factor). The Court's decision in *Goode* obviously does not invalidate our holding in *Proffitt* as to the effect of the confrontation clause.

3. Alvord dropped at oral argument (held after the *Goode* decision) the contention that *Proffitt* controls here and asserted that this case is distinguishable from *Goode* for the reasons discussed below.



relied on their existence in *Goode* and concluded that it was not a case, as was *Barclay* or *Ford v. Strickland*, 696 F.2d 804, 815, 820 (11th Cir.1983) (en banc), in which the Florida "harmless error" rule applied. In both *Barclay* and *Ford*, no mitigating circumstances were found; however, in *Goode*, as in this case, substantial mitigating factors (here, inability to conform to the requirements of the law and extreme mental disturbance) were present. The Supreme Court invalidated that distinction.[4]

In the final analysis, the Supreme Court in *Goode* held that if the state supreme court approves a conviction and death sentence despite reliance on evidence of, or findings of, nonstatutory circumstances, a federal habeas court cannot grant relief unless the evidence or factor in question was constitutionally inappropriate. *See also Zant v. Stephens*, 103 S.Ct. at 2748–49; *Barclay*, 103 S.Ct. at 3434–35 (Stevens, J., concurring). There is no basis for finding unconstitutional the nonstatutory factor at issue here; indeed, the factor—future dangerousness—is the same factor relied on in *Goode*. And we find no distinction between the review and approval of the death sentence by the Florida Court in this case and the review and approval in *Goode*. *Compare Alvord v. State*, 322 So.2d 533 (Fla. 1975) *with Goode v. State*, 365 So.2d 381 (Fla.1978). Although the Florida Court approved the death sentence in *Alvord* without mention of the trial judge's reliance on the nonstatutory factor, the same was true in *Goode*, and the Supreme Court approved that procedure.[5]

4. The Supreme Court indicated in *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), that although the presence of mitigating circumstances might be constitutionally significant, the issue was not before them in that case. The Court stated:

> Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

[1] *Henry III* and our above analysis of the *Goode* decision invalidate the remaining distinctions raised by Alvord at oral argument. He contends that the evidence of dangerousness in this case was not properly admissible and that the failure of the Florida Court to follow its statutes violates the due process clause. In *Goode*, the Court invalidates the latter argument: in both this case and in *Goode* the Florida Court followed exactly the same procedure. As to the former argument, both *Goode* and *Henry III*, 721 F.2d at 994, indicate that admissibility of evidence, absent constitutional infirmity, is a question of state law. The evidence here was relevant to Alvord's character, which is a proper subject of inquiry at a sentencing hearing. *See, e.g., Barclay*, 103 S.Ct. at 3434–35 (Stevens, J., concurring). Finding no distinctions of significance between this case and *Goode*, we reverse the order of the district court granting the writ because of the trial judge's reliance on the nonstatutory factor.

## II. EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

On cross-appeal, Alvord first argues that the district court erred in deciding that he received effective assistance of counsel at trial and that his counsel's assistance at his sentencing hearing, although ineffective, did not prejudice him. He contends that his trial counsel, Mr. Meyers, failed adequately to investigate the possibility of an insanity defense at trial and committed a clearly prejudicial mistake in failing to raise such a defense. He also contends that Meyers failed to unearth and present evi-

*Id.* 103 S.Ct. at 2750. In *Barclay*, the Court noted that no mitigating factors were found by the judge, although some existed. 103 S.Ct. at 3435–36 (Stevens, J., concurring). In *Goode*, the Court thus extended its holding in *Barclay* to cover cases in which the trial judge finds mitigating factors to exist.

5. As we noted in *Henry III*, 721 F.2d at 994–995, the failure of the Florida Supreme Court affirmatively to pass on an issue apparently does not lessen the deference required by *Barclay* and, now, by *Goode*.

dence at the sentencing hearing demonstrating his lack of ability to conform his conduct to the requirements of the law. We conclude that the district court properly resolved both issues against Alvord.[6]

The record demonstrates that Alvord has a long history of mental illness. He first entered a mental hospital at age thirteen. In 1967, he was charged with the rape and murder of a ten-year old girl in Michigan; after spending two years in an institution, he was declared competent to stand trial on the charge but was found not guilty by reason of insanity. Alvord committed the three murders for which he received the death sentence after escaping from the Ionia State Hospital in Michigan.

Meyers was appointed counsel for Alvord shortly after Alvord was indicted in 1978. Alvord refused to talk with Meyers; however, Meyers learned from the prosecutor that Alvord had been adjudicated not guilty by reason of insanity in Michigan. Meyers therefore moved for a mental examination of Alvord, and the trial judge directed two court-appointed psychiatrists, Drs. Sprehe and Gonzales, to conduct the examination. Alvord refused to talk with the psychiatrists without his attorney present, and the psychiatrists could give no opinion as to Alvord's mental state. The trial judge therefore committed Alvord to a state hospital for observation. The judge later rescinded this order, however, because he doubted his authority to issue it,[7] and the state instead invited Dr. Robey, a psychiatrist who had worked with Alvord in Michigan, to come and conduct an examination.[8]

Alvord talked with Dr. Robey, and Robey testified at a pretrial hearing held by the court that Alvord was competent to stand trial. *See infra* § IV (setting forth Robey's testimony). Robey again examined Alvord after the hearing and concluded that Alvord was both competent to stand trial and sane at the time he committed the offense. (Apparently the illness suffered by Alvord is a type that can suddenly recur or go into long remissions.) The court ordered that Sprehe and Gonzales again attempt to examine Alvord; at another competency hearing, Sprehe testified that Alvord was competent to stand trial, but qualified his opinion because Alvord was still uncooperative. Gonzales, because of Alvord's lack of cooperation, could form no opinion. Relying on the testimony of Robey and Sprehe, the court ruled Alvord competent to stand trial.[9]

6. The district court held an evidentiary hearing on this claim; Alvord does not challenge the adequacy of the hearing.

7. Meyers did not learn until several weeks had passed that Alvord had not been committed. He then moved several times to have Alvord recommitted.

8. Alvord contends that the trial judge issued these orders on his own motion or at the suggestion of the prosecutor. From examining the record, however, we conclude that Meyers made numerous motions; for example, the state contended at a speedy trial hearing that delays in the trial were caused by Meyers' numerous motions to have Alvord examined or committed or both. Meyers and the trial judge clearly accepted these statements by the prosecutor as true. Thus, Alvord's present contention that Meyers virtually ignored him before the trial is contradicted by these portions of the record.

9. Alvord asserts that the trial court's reliance on Robey's testimony was improper. Although we will more fully address this contention in a later section of our opinion, *see infra* § IV, we pause now to note the unique role played by Dr. Robey in these proceedings. The trial judge made every effort to ensure that Alvord received a fair and adequate examination. Both Alvord's attorney and the prosecutor wanted a mental examination of Alvord to be conducted; however, Alvord repeatedly refused to talk to the court-appointed psychiatrist. Therefore, at state expense, the trial judge requested Dr. Robey to fly in from Michigan to examine Alvord. Robey had been primarily responsible for Alvord's treatment while he was a patient in Michigan; and, as Robey testified at trial, he knew Alvord better than any other doctor. *See infra* § IV (quoting from transcript).
Robey's knowledge of Alvord's history and illness placed him in a uniquely qualified position to perform the needed examination. Furthermore, he was a psychiatrist with whom Alvord was willing to talk and by whom Alvord would consent to be examined. The trial judge could well have concluded that if one of the numerous psychiatrists in Florida could not examine Alvord, calling in a psychiatrist from Michigan would be a waste of resources. He did not so conclude, and we commend the judge for responding to the problems presented by Alvord's refusal to talk to court-appointed doctors by adopting the logical solution of obtaining, at obvious expense, the doctor most qualified to render an opinion.



Nevertheless, a few weeks before trial, the court ordered Sprehe and Gonzales again to examine Alvord. Sprehe again testified, after the examination, that Alvord was competent; Gonzales again could not form an opinion. Neither doctor could testify as to Alvord's sanity at the time of the offense. Although Meyers asserted that the Michigan conviction constituted prima facie evidence of incompetency, the trial judge, noting that Meyers had produced no documentary evidence of that judgment, again pronounced Alvord competent to stand trial. Before trial, Meyers moved unsuccessfully for Alvord to be committed for observation and filed a notice of intent to plead insanity, attaching a copy of Alvord's previous acquittal on the basis of insanity, which is now inexplicably absent from the state trial record.[10]

A. *Meyers' Assistance at the Guilt-Innocence Phase.*

Meyers conducted no independent investigation into Alvord's history of mental illness. He did not contact doctors, other than Robey, at the Michigan hospital at which Alvord spent a considerable amount of time, nor did he obtain any except a small portion of Alvord's medical record. He did not raise at trial the presumption of insanity afforded Alvord under Florida law by reason of his prior adjudication of insanity, the effect of which is to place the burden on the prosecution to prove sanity beyond a reasonable doubt. *See Parkin v. State*, 238 So.2d 817 (Fla.1970); *Livingston v. State*, 383 So.2d 947 (Fla.App.1980); *Hixon v. State*, 165 So.2d 436 (Fla.App.1964). Alvord contends that these actions and inactions constitute ineffective assistance.

In response to Alvord's contentions, the state argues that Meyers properly failed to investigate the possibility of raising the insanity defense because Alvord refused to allow that defense and properly failed to raise the defense because Alvord insisted on relying on an admittedly weak, unsupported alibi.[11] Meyers testified at the evidentiary hearing that Alvord's lack of cooperation caused him to abandon the insanity defense; given Robey's opinion that Alvord was sane at the time of the offense, Meyers did not think it would be successful without Alvord's cooperation.

[2, 3] The question we must decide is whether, under the circumstances, Meyers' decisions and actions constituted reasonably effective assistance. *See Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). It is now axiomatic that the petitioner must prove his counsel ineffective by a preponderance of the evidence. *Id.* at 1250. It is also axiomatic that counsel has a duty to conduct a reasonable investigation under the circumstances. *Id.* at 1251–58. The issue presented in this case, however, is slightly different than the issue in *Washington v. Strickland* and in many other cases: here, the defendant, Alvord, did not want and affirmatively sought to prevent his trial attorney from asserting the insanity defense that he now claims his attorney, as a matter of constitutional law, should have raised. Thus, this is not the same case as several cited by Alvord in which the defendant was willing to assert the defense but his attorney's inadequacy prevented him from doing so successfully. *See Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. Unit B 1981); *Davis v. Alabama*, 596 F.2d 1214 (5th Cir.1979), *vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); *United States v. Fessel*, 531 F.2d 1275 (5th Cir.1976).

We conclude that in this case the assistance rendered by Meyers met the requirements of the Constitution. *See, e.g., Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir.1981) ("effectiveness may not be ...

10. The district court found (as an undisputed fact) that Meyers filed this notice, and it was now been added to our record on appeal.

11. The evidence produced at trial of Alvord's guilt was overwhelming.

sumed through the finely ground lenses of 20/20 hindsight"). Here, the state provided three psychiatrists to interview Alvord, and he would only communicate with Robey. Robey, who indicated that he was more familiar with Alvord than any other psychiatrist, testified that Alvord was both sane and competent to stand trial. *See infra* § IV (setting forth testimony from transcript). After repeated and conscientious attempts to have doctors communicate better with Alvord, the trial judge ruled Alvord competent. Meyers repeatedly advised Alvord to assert the insanity defense, but Alvord refused to do so. Meyers therefore did not assert the defense but argued that Alvord's incapacity weighed against imposition of the death penalty.

[4] In light of Alvord's refusal to assert the insanity defense, although earnestly counseled by his defense attorney to do so, we conclude that Meyers rendered competent assistance. Further research into Alvord's background would have been fruitless because Alvord would not allow Meyers to produce evidence of insanity. The trial judge held Alvord competent—on the unrebutted advice of two psychiatrists—and the only psychiatrist able to form an opinion would have testified that Alvord was sane. In addition, given Alvord's competency, Meyers was ethically bound to follow his client's wishes. *See Foster v. Strickland*, 707 F.2d 1339, 1343 (11th Cir.1983). In *Foster*, the attorney wanted to present a second-degree murder defense based on a depraved-mind theory; the defendant refused to allow that defense, and this court held that the decision of the attorney to follow his client's wishes did not constitute ineffective assistance. *Id.*

We realize that there may be cases in which the client's faculties are so impaired that the client cannot choose for himself what to do. Alvord argues that this is the problem here and cites *Brennan v. Blankenship*, 472 F.Supp. 149, 156 (W.D.Va.1979), *aff'd mem.*, 624 F.2d 1093 (4th Cir.1980); however, we need not comment on the resolution of that case by our sister circuit nor do we need to speculate here on what facts might lead us to conclude that the attorney should ignore his client and pursue some other unspecified course of action. Hopefully, if the client cannot adequately help prepare his defense, the trial judge will rule him incompetent to stand trial. Here both psychiatrists testified to Alvord's competency, and Meyers made a reasonable effort to convince the judge to rule Alvord incompetent.[13] Given this determination, Meyers adopted a reasonable course of action under the circumstances.

### *B. Effective Assistance at the Sentencing Hearing.*

[5] Alvord contends that Meyers failed to provide effective assistance at his sentencing hearing because he failed to collect and present as mitigating evidence Alvord's extensive history of mental illness; failed effectively to cross-examine Robey, who testified for the state, because of Meyers' unfamiliarity with Alvord's background; failed to produce other psychiatrists as "rebuttal witnesses"; and failed to produce witnesses to testify favorably regarding Alvord's character. The record demonstrates that Meyers called no witnesses at the sentencing hearing; however, Meyers testified before the district court that, had the state not called Robey, he would have called him because Robey would testify to the existence of the two mitigating circumstances found by the jury and judge. The district court stated that it was "prepared to conclude that" Meyers rendered ineffective assistance because of his failure adequately to investigate Alvord's background; however, the court denied the writ on this issue because it found that Alvord suffered no prejudice. We also conclude that Alvord suffered no prejudice; we therefore need not decide whether Meyers' assistance was ineffective.[14] *See Washington*, 693 F.2d at 1264 n. 23 (no need to address ineffectiveness if no prejudice).

[6] At the sentencing hearing, Robey testified to the existence of the two mitigating circumstances found in this case. He stated that Alvord had been previously adjudicated insane and asserted strongly that Alvord's mental illness was not of the type that Alvord could not be rehabilitated. The state called Robey, so Alvord cannot blame Meyers for any testimony by Robey that he now considers damaging.[15] As the district judge noted, Alvord offered at neither the state nor the federal habeas evidentiary hearings evidence that Meyers could have produced had he conducted an investigation and called other witnesses; he also did not explain how Meyers could more effectively have cross-examined Robey. Alvord has called our attention to no evidence that Meyers should have produced at the sentencing hearing but did not; Alvord has not, therefore, carried his burden of establishing prejudice.[16]

Alvord contends that he deserves a new sentencing hearing despite our conclusion that he has not been prejudiced because in this case the "ineffectiveness of counsel is so pervasive that a particularized inquiry into prejudice would be 'unguided speculation.'" *Washington*, 693 F.2d at 1259 n. 25 (quoting *United States v. Porterfield*, 624 F.2d 122, 125 (10th Cir.1980)). We are mindful that actual prejudice need not be demonstrated in some cases. *See Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (state improperly requires single attorney to represent multiple defendants at same trial); *Adams v. Balkcom*, 688 F.2d 784, 739 n. 1 (11th Cir.1982) (representation "functionally equivalent in every respect to having no representation at all"). We recognized in *Washington v. Strickland* that prejudice need not always be demonstrated, 693 F.2d at 1259; however, *Washington* clearly implies that prejudice must be shown in this case. In both this case and *Washington*, the alleged inadequacy stems from a failure adequately to investigate, and we required the petitioners to show prejudice in *Washington*. We sit as a habeas corpus tribunal to grant relief to persons *harmed* because their *constitutional rights* have been violated. In some cases, we will infer harm because, although it is difficult or impossible to prove, the circumstances of the petitioner's conviction are inherently prejudicial. In some cases, the harm is so obvious it would be a waste of resources to prove it. This case presents neither situation; the district court correctly

13. We have read the record of all the pretrial proceedings in this case. We are convinced that Meyers rendered effective assistance: he argued for Alvord's commitment, he moved for a declaration of incompetency; he cross-examined the expert witnesses. Meyers cannot be faulted simply because he did not succeed.

14. Alvord contends that parts of Robey's testimony were not admissible. Alvord's contention, which we have rejected above, is without merit. *See supra* § I (*Goode* decision requires deference to state evidentiary law; no constitutionally inadmissible evidence in this case).

15. Alvord asserts in his brief that Meyers should have called witnesses in order to "humanize" Alvord in the eyes of the jury. The district court did not pass on the issue of whether Meyers' assistance was effective; however, the court indicated that it was prepared to find the assistance ineffective. We also do not pass on this issue, however, we note that the failure to attempt to "humanize" Alvord may well have been the most reasonable choice under the circumstances. It is not good trial tactics to attempt to persuade a jury of the verity of a proposition when it is manifestly impossible to do so. Alvord had committed three violent murders and had an extensive history of past criminal activity. He was not, to say the least, the boy next door who had never before shown a propensity to commit a crime. Meyers reasonably chose to rely primarily on the statutory mitigating circumstance that Alvord could not conform his conduct to the requirements of the law and argue to the jury that incarcerating Alvord would be sufficient specially to deter him from committing future crimes.

ly held that Alvord must prove prejudice to obtain the writ.

## III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

[7-9] Alvord next contends that his appellate counsel rendered ineffective assistance. He sets forth five issues that his appellate counsel did not raise—issues that, according to Alvord, would have persuaded the Florida Supreme Court to overturn his conviction. Although we address claims of ineffective assistance of counsel on appeal much less frequently than claims of ineffective assistance at trial, it is well established that a defendant has the right to effective counsel on appeal. *See Anders v. California*, 386 U.S. 738, 741–42, 744, 87 S.Ct. 1396, 1398–99, 1400, 18 L.Ed.2d 493 (1966) (counsel must function as advocate on behalf of client). In order to prevail, Alvord must prove that he did not receive "'reasonably effective representation,'" *Mylar v. Alabama*, 671 F.2d 1299, 1300 (11th Cir. 1982) (citing previous cases), *cert. denied*, — U.S. —, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); however, counsel need not provide perfect assistance, *id.* From the reported cases, it appears that counsel's failure to file a brief is in most cases ineffective, *see Anders; Mylar*; however, counsel's failure to advance errors on appeal later gaining "judicial recognition" does not constitute unconstitutional aid, *Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), and counsel need not brief issues reasonably considered to be without merit, *Mendiola v. Estelle*, 635 F.2d 427, 491 (5th Cir. Unit A 1981); *Hooks v. Roberts*, 480 F.2d 1196, 1197–98 (5th Cir. 1973), *cert. denied*, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Alvord contends that the issues not raised by his counsel were of substantial merit. As we stated in *Hooks*, the best way to evaluate "this question . . . is to examine the alleged trial errors to see if they contain sufficient merit . . . that his appellate counsel can be faulted for not having raised them." 480 F.2d at 1197.

### A. *Failure of Trial Judge Sua Sponte to Give Insanity Instruction*

Alvord argues that his appellate counsel should have asserted as error the failure of the trial judge *sua sponte* to charge the jury that, because of his prior judgment of not guilty by reason of insanity, he was presumed insane until proven sane. We find ourselves in a rather unusual posture in this case. On the one hand, the issue of ineffective assistance—even when based on the failure of counsel to raise a state law claim—is one of constitutional dimension, *see Hooks*, 480 F.2d at 1197, and, as a mixed question of fact and law, the presumption of correctness under 28 U.S.C. § 2254(d) does not apply to this type of claim, *see, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 341–42, 100 S.Ct. 1708, 1714–15, 64 L.Ed.2d 333 (1980). On the other hand, the validity of the claim that Alvord's appellate counsel failed to assert is clearly a question of state law, and we must defer to the state's construction of its own law. *Wainwright v. Goode*, — U.S. —, — — —, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983). In this instance, Alvord raised the present claim before the Florida courts on collateral attack of his conviction; and, in *Alvord v. State*, 396 So.2d 184, 191 (Fla.1981), the Florida Supreme Court expressly rejected it as without merit.

[10] Although a bewildering mixture of issues both subject to and not subject to a presumption of correctness face us in this case, we believe the proper method of analysis is to accord deference to the Florida Supreme Court's decision to the extent it decides the validity of Alvord's underlying state law claims while reserving for *de novo* consideration the ultimate issue of whether Alvord received constitutionally effective assistance. Following this analysis, it is clear from *Alvord v. State* that the Florida Court held that, as a matter of state law, the trial judge need not have instructed the jury *sua sponte* on the presumption of insanity. Quoting the trial court, the Florida Supreme Court stated:



> This ground for post conviction relief is also without merit. No proof of the Defendant's prior adjudication of insanity had ever been submitted to the Court and no such defense was raised. A Defendant has the burden of establishing a plea of insanity by showing that he was legally insane when he committed the criminal act. *Hixon v. State*, (D.C.A.1964) 165 So.2d, 436. The trial court is only required to instruct the jury on issues properly raised. Since the Defendant did not choose to assert the defense of insanity, it would have been improper for the trial Court to have instructed the jury on that issue.

396 So.2d at 190–91. It thus seems clear that the trial judge, as a matter of state law, need not have given an instruction that was never requested.[16] Indeed, this conclusion is the only reasonable one under the circumstances—with or without the Florida Supreme Court's decision to aid us. Given the invalidity of the claim that Alvord contends should have been asserted, we conclude that, under *Hooks* and *Mendiola*, Alvord has failed to demonstrate with respect to this issue that his counsel rendered ineffective assistance.

### B. *Failure of Trial Court to Grant Alvord's Pro Se Motion to Remove Public Defender as Counsel*

At trial, Alvord requested the Judge to remove his appointed counsel, Mr. Meyers, because he did not trust Meyers to represent him. The trial judge indicated that he would consider the motion and instructed Meyers to file a formal, written motion should Alvord so desire. The trial judge did not remove Meyers from the case, however; and Alvord now contends that his appellate counsel should have asserted that the trial judge erred by not appointing a different counsel. Noting that the state collateral review court found as a matter of historical fact that Alvord "ultimately consented to being represented by . . . Meyers," the district court held that finding to be fairly supported by the record, *see* 28 U.S.C. § 2254(d), and concluded that reasonable counsel could have decided not to raise the issue on appeal, citing *United States v. Young*, 482 F.2d 993 (5th Cir.1973).

Alvord first argues that the district court erroneously treated the state court's finding on the consent issue as a question of historical fact instead of a mixed question of law and fact, which is afforded no presumption of correctness under section 2254. Alvord cites only *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), as support for this contention. We do not find *Cuyler* controlling here. In *Cuyler* the Court held that whether an attorney represented more than one defendant at trial is a mixed question and not entitled to a presumption of correctness. *Id.* at 341–42, 100 S.Ct. at 1714–15. Whether Alvord decided to accept Meyers as his counsel is clearly a question of historical fact. *See Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Unlike the issue in *Cuyler*, the inquiry here does not go directly to the effectiveness of the defendant's counsel or the prejudice caused by the representation afforded by the state. Thus, the district court properly afforded deference to the state court's finding on this issue.[17]

[11] We must, of course, decide without employing a presumption of correctness whether Alvord's appellate counsel was ineffective in failing to raise the present issue. The finding that Alvord accepted his trial counsel certainly supports his appellate counsel's decision not to raise the point. In addition, the record demonstrates that the trial judge had every reason to believe that Meyers and Alvord had resolved their differences from Meyers' statements to that

16. We realize that the state court's assumption that Meyers never submitted the prior adjudication of insanity at trial has now been demonstrated to be erroneous. *See supra* note 10 and accompanying text. This does not alter our conclusion that the ground not asserted on appeal lacked merit. Meyers did not plead insanity at trial; and it seems clear from the state court's opinion that the judge need not instruct on an issue not raised.

17. Alvord does not contend that he did not receive a full and fair hearing

effect at the trial. *See Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir.1982) (en banc) (trial judge may accept counsel's statements and need not interrogate defendant independently). Given these underlying facts, we conclude that Alvord's counsel acted reasonably by not raising this claim on appeal.

C. *Examination of Alvord by Dr. Robey.*

[12] As we have related above during our discussion of the events leading up to Alvord's trial, *see supra* § II, Dr. Robey examined Alvord, at the request of the trial judge, to determine his competency to stand trial. During the sentencing hearing, Dr. Robey testified for the state; although he based his testimony in part on his previous knowledge of Alvord, he also relied on the pretrial interviews. Alvord contends that the trial judge should not have allowed Robey to testify at the sentencing hearing under the rule stated in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). The issue before us is whether his counsel's failure to raise this issue on appeal constituted ineffective assistance.

The issue is not without difficulty. The predecessor to this court, in an opinion binding on us,[18] held that *Estelle v. Smith* applies retroactively. *See Battie v. Estelle*, 655 F.2d 692, 696–99 (5th Cir.1981). Nevertheless, the present fifth circuit apparently has held (in a non-binding opinion) that failure of counsel to anticipate *Estelle v. Smith* and timely enter an objection does not constitute ineffective assistance of counsel. *See Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 3099, 77 L.Ed.2d 1357 (1983). This holding is in accord with the rule stated in *Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), that counsel need not anticipate new developments in the law.

We need not rely only on the principle stated in *Sullivan*, however. As the district judge aptly noted:

> Several aspects of this case also indicate that Mr. Seymour cannot be faulted for not raising a *Smith* point on appeal. First, trial counsel failed to object to Dr. Robey's arguably *Smith*-violative testimony that petitioner would be dangerous to women in the future and that he was sane at the time of the Florida crimes. Trial Rec. at 1171–72, 1178–79. Second, and more fundamentally, the *Smith* issue would not necessarily have succeeded on appeal. In *Smith* the psychiatrist who examined the accused, Dr. Grigson, testified on the basis of that examination alone. Thus, there was no question that his conclusions on future dangerousness were based on statements made during a custodial examination without prior *Miranda* warnings or notice to counsel. Mr. Seymour faced quite a different circumstance: Dr. Robey had supervised Alvord's treatment for years prior to his escape in Michigan, and his contemporaneous examination of Alvord was in two sessions, the latter of which—on the specific question of petitioner's sanity at the time of the offense—was apparently in substantial compliance with the dictates in *Smith*. His testimony was therefore not based entirely, and may not have been based at all, on the first custodial examination. Finally, the record indicates unequivocally that Mr. Meyers was eager for Dr. Robey to examine his client. Meyers Depo. at 31
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> 564 F.Supp. at 481–482 (footnotes omitted). Given these factors, the rule in *Sullivan*, and the fifth circuit's holding in *Gray*, we conclude that Alvord's appellate counsel rendered reasonably effective assistance even though he failed to raise this issue.

D. *Testimony by Robey in Violation of Fla.Stat.Ann. §§ 90.242 & 921.141.*

At the sentencing hearing, Robey testified that Alvord had previously committed two misdemeanors in Michigan and that he had committed kidnapping and rape for which he had been found not guilty by reason of insanity. Robey stated that he did not believe Alvord to have been insane when he committed the rape and kidnapping, however. Alvord argues that this testimony was not properly admissible under the Florida capital sentencing statute, Fla. Stat. § 921.141, because it does not tend to prove the presence or absence of the specified aggravating and mitigating circumstances. He also contends that it was admitted in violation of the psychiatrist-patient privilege then codified by Fla.Stat. § 90.242. He urges this court to conclude that his counsel's failure to raise these issues on appeal constituted ineffective assistance.

[13] We begin our analysis by noting that Alvord's attorney raised a similar issue on appeal: he contended that Robey's testimony concerning the Michigan felonies was inadmissible under *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Florida Supreme Court rejected this claim. *Alvord v. State*, 322 So.2d 533, 539 (Fla.1975). Given the Florida Court's statement in that case that a wide-open rule of admissibility applies at penalty hearings, *id.*, we think it reasonable for Alvord's counsel not to have asserted the grounds now set forth as limiting the admissibility of Robey's testimony. The testimony clearly bears on the presence or absence of prior criminal activity, Fla.Stat. § 921.141(6)(a), and the capacity of Alvord to conform his conduct to the requirements of the law, *id.*, § 921.141(6)(f).

In addition, Alvord's counsel was reasonable in not asserting the psychiatrist-patient privilege. As the district court stated:

> The short answer is that the trial court took considerable care to ensure that Dr. Robey testified only to matters surrounding the Michigan crimes of which he had knowledge independent of communications from Alvord. Next, petitioner cites *Parkin v. State*, 238 So.2d 817, 818 (Fla. 1970) as grounding a possible argument on appeal. *Parkin*, decided over a decade before *Smith*, held that the fifth amendment rights of a criminal defendant who chooses to plead insanity were not violated when she was ordered by the trial court to cooperate with court-appointed psychiatrists. The court limited the use of such testimony: "[A]ny statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them." *Id.* at 822. The answers to petitioner's contention that Mr. Seymour should have raised *Parkin* are twofold: first the record reflects again the care of the trial judge in limiting Dr. Robey's testimony on the Michigan crimes to facts he knew from sources other than Alvord's statements; and second, Dr. Robey certainly did not come to know of Alvord's criminal record in the course of the custodial examination he made in January 1974, and *Parkin*'s limitations therefore would not apply. Thus, the decision not to raise these matters on appeal was a reasonable tactic.

This reasoning well supports the district court's conclusion that Alvord received effective assistance of counsel on appeal.[19]

IV. ADEQUACY OF PSYCHIATRIC HEARING BEFORE TRIAL

[14, 15] Alvord contends that he did not receive due process of law at his trial because the competency hearings conducted by Dr. Robey, Dr. Gonzales, and Dr. Sprehe were insufficient to allow the trial judge accurately to rule on his competency to stand trial. Alvord relies on *United States v. Taylor*, 437 F.2d 371 (4th Cir.1970), and *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga. 1981) (appeal docketed 5/13/81), and calls our attention to Judge Sobeloff's opinion in *Taylor* discussing critically the competency examination in that case, *see* 437 F.2d at 379–83. It is now well established that conviction of a legally incompetent defend-

18. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc).

19. Alvord raises one other issue dealing with his counsel's alleged inadequacies. He contends that his counsel should have argued on appeal that he received an inadequate psychiatric examination. As we conclude in the next section of this opinion, Alvord received a proper examination and hearing. *See infra* § IV. Thus, his counsel cannot be faulted for failing to raise this claim.

ant violates due process. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966); *Reese v. Wainwright*, 600 F.2d 1085, 1090-94 (5th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979). Stated in another way, the state must have held "an adequate hearing on [Alvord's] competency," *Pate*, 383 U.S. at 386, 86 S.Ct. at 842, or we must hold Alvord's conviction invalid. The district court properly refused to invalidate the conviction because an examination of the record shows that the state afforded Alvord an adequate hearing.

We need not repeat here the rather detailed account of the pretrial proceedings related to Alvord's competency set forth above. *See supra* § II. To summarize the events, the trial judge several times ordered two psychiatrists to examine Alvord, but they were unable at first to form an opinion because of Alvord's failure to cooperate. The judge then ordered that Alvord be sent to the state mental hospital for observation, but he rescinded that order because he believed he lacked the necessary authority to enter it. In order to obtain a meaningful examination and opinion, the court invited Dr. Robey to come to Florida from Michigan to examine Alvord at state expense. Robey talked twice with Alvord, and, primarily on the basis of Robey's diagnosis, the judge found Alvord competent.

Alvord argues that the examination he received was grossly inadequate because of the poor conditions and lack of time spent together by Robey and Alvord. Robey testified to this effect at the district court's evidentiary hearing. Supp.Appellate Rec. II, 21-24. We find no indication that Robey believed at the time he conducted his examination that he was operating under unacceptable conditions, however. The record shows that Robey submitted the following report to the trial judge:

> The above-named 26-11[?] year old white, married Catholic male was interviewed on two separate occasions at the Hillsborough County jail in Tampa, Florida. This evaluation was made at the request of the State Attorney following the defendant's refusal at an earlier date to in any way cooperate with the court-appointed examining psychiatrists, Doctors Arturo G. Gonzales and Daniel J. Sprehe.
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> The defendant in the present case is charged with three counts of first degree murder. He had previously been acquitted by Reason of Insanity in the State of Michigan, and had been committed at the Ionia State Hospital, Michigan's equivalent of Chattahoochee State Hospital in Florida. He had escaped from this institution on January 24, 1973, and had traveled to Florida. It was while on escape from Ionia State Hospital that he is alleged to have committed the three murders with which he presently stands charged.
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> The defendant was interviewed on two separate occasions. On the first of these interviews, on January 3, 1974, he was seen from 1:45 to 4:40 p.m. with one ten-minute break for the interviewer to answer a telephone call. Interview time on this date totaled two hours and forty-five minutes. During this initial interview, evaluation was done of the defendant's competency to stand trial, but due to his refusal to discuss any of the details of the acts with which he was charged, no opinion could be rendered on criminal responsibility except one generally based on prior knowledge of the defendant in comparison with the mental state as seen during the interview. On the basis of this interview, an opinion was rendered in Court that the defendant was fully capable of recognizing the nature and object of the proceedings, his own position in those proceedings as defendant, the nature and extent of the charges against him, and the possible penalties, and he was felt to be fully capable, insofar as he wished, to advise and cooperate with counsel in both the preparation and implementation of his defense. The defendant did make a statement both on interview, and subsequent thereto on January 4 before the Court, that he had less than complete faith in his assigned counsel and demonstrated this by comparison with the lawyer who had been assigned to him in Michigan on the question of his extradition to Florida. This very fact itself was indicative of competency to stand trial.
>
> In regard to the question of criminal responsibility, as indicated above, the defendant initially would not discuss the situation. It was only after being reassured from the Bench by the Judge that any inculpatory statements he might make to the psychiatrist could not be used in the case in chief, that he then expressed willingness to discuss the matter.
>
> On January 4, 1974, the defendant was seen again from 6:45 to 9:00 p.m. on the issue of criminal responsibility. Based on this two and one-quarter hour interview, an opinion is rendered that in reference to the act charged, the defendant was aware of the wrongfulness of his actions. Despite this, paranoid and schizoid features are seen in the underlying basic immature sociopathic personality disorder, and were an A.L.I. Model Penal Code test used in the State of Florida, there could conceivably be some argument that, by reason of mental disease, he lacked substantial capacity to conform his behavior to the requirements of the law.
>
> In summary, an opinion is rendered that the defendant, Gary Alvord, is both competent to stand trial and criminally responsible under Florida law.

At one of the numerous pretrial hearings, Robey made the following statements concerning the adequacy and results of his examinations:

> Q. And throughout this interview with and examination of the defendant, Gary Alvord, were you able to form an opinion as to whether or not he would be able to aid and assist his counsel in the preparation and presentation of his defense?
>
> A. Yes, sir, I think, I have some qualifications in this area, but the qualifications are as we concerned with the fact that he has been aware of comparisons or has made comparisons between the assistance he obtained from counsel here and the assistance he obtained, for instance, from counsel in Michigan at the time of his extradition. This showed me, of course, that while he might be concerned about the expertise that would be applied legally to his case, that any reluctance to cooperate would be just that. It would not be in any way based on mental illness. It would be based in the hope for the maximum representation he could receive.
>
> Q. Are you saying that he was concerned that he was not going to get full legal protection here as opposed perhaps to the attorney he had in Michigan?
>
> A. That is correct.
>
> Q. Is that what you are saying?
>
> A. Yes.
>
> Q. So, it didn't have anything to do with any mental illness that he might not be able to—
>
> A. No, sir.
>
> Q. —aid and assist his counsel?
>
> A. This, this was based in what I feel was entirely, logical, reasonable concern, particularly in view both of capital punishment being reinstituted in this state and the realization of the severity of the offense with which he is charged. And it indicated to me not that he was incompetent but that his abilities to thoroughly evaluate the legal situation were, as I indicated before, perhaps above average.
>
> Q. Okay. So, as to his ability to aid and assist counsel, there is no, in your opinion, there is no mental illness or disease that would prevent or preclude him from aiding and assisting his counsel?
>
> A. That is correct.
>
> Q. Okay. Now, was he able to understand the charges pending against him in this case, three counts of murder in the first degree?
>
> A. Yes.
>
> Q. And that is your opinion regarding that?
>
> A. That's correct.
>
> Q. Okay, No qualifications regarding it?
>
> A. No, sir.
>
> Q. As to his understanding of the charges?

A. All of these are within the bounds of reasonable medical certainty.

Q. Okay, Doctor, your opinion at this point would be that Gary Alvord is competent to stand trial?

A. That's correct.

Q. Okay. Thank you.

In response to questions by Meyers on cross-examination, Robey stated:

Q. Were you able to adequately make a determination on January the 18, 1973?

A. Of what, Mr. Meyers?

Q. Of his mental condition?

A. Oh, yes, sir. I think once you have obtained an adequate past history and get to know someone well, as little a period of time as thirty seconds to a minute can give us more than adequate diagnostic information, again based on the fact that you already know the defendant, the patient, well.

. . . . . .

A. Well, Mr. Meyers, I think I could give you many examples, both actual and certainly hypothetical ones that might be of greater assistance to the Court, where psychiatric diagnoses can be made in as little as five to ten seconds, if the symptoms are sufficiently overt. But as I indicated previously in my testimony, when you get to know someone quite well, as I had Gary, a very few minutes will suffice. I am quite sure you yourself can go home at night and perhaps within five seconds know whether you wife is feeling happy, sad or—

Q. I won't argue with you.

Robey also testified that he was the doctor most familiar with Alvord:

Q. So, it's your opinion you know more about him than anybody else who was there?

A. That's correct.

The state trial court also based its findings on the report of Dr. Sprehe, who, after repeated attempts to examine Alvord, reached the following qualified conclusions:

Pursuant to your order I again tried to perform a psychiatric examination on Gary Eldon Alvord on 1/8/74. As you know, I tried to interview him on 10/9/73 but at that time he had refused to talk to me, stating that if I was a doctor he didn't want to talk to me even though I tried to explain my position at that time regarding being assigned by the court, etc. to talk to him. He stated that he was aware of his rights and that he didn't need to talk to anybody and therefore I was unable to perform a psychiatric examination.

Since that time I talked to Dr. Ames Robey who was his doctor in Michigan when he was in the State Hospital there and Dr. Robey stated that he thought he had persuaded Mr. Alvord to be willing to talk to me but he wasn't sure, but at any rate that Mr. Alvord certainly understood his legal rights and his legal position and was certainly able to stand trial. This was the opinion of Dr. Robey.

Armed with this information, I again went to talk to Mr. Alvord on 1/8/74 and he again in a very friendly way refused to talk with me. He denied talking with Dr. Robey and stated that he had just fired his attorney and that he couldn't talk with me without an attorney present and that he had no wish to talk to me anyway and that he knows his rights and that his rights are that he must have an attorney present if he wants one whenever he is being interviewed by anyone. I tried to explain my neutral position and the fact that I am only appointed as an expert witness to examine him but he was unwilling to listen to my explanation and finally walked out of the interview room without further examination being conducted.

It is my definite impression that Mr. Alvord is mentally competent to stand trial and that he is able to understand the nature of the charges against him and that he is able to assist counsel in the preparation of his defense; however, this impression is offered on the basis of my brief meeting with him plus my conversation with his old psychiatrist, Dr. Ames Robey.



It appears from these record excerpts that Alvord received a constitutionally adequate examination. We are not prepared to hold, as Alvord requests, that the state must commit all defendants to the state mental hospital for observation if they so request. We also are not prepared to invalidate Alvord's conviction because Robey, years after his pretrial examination, has expressed limited qualifications as to his conclusions.[20]

## IV. *MIRANDA* VIOLATIONS

At trial, the police officer who arrested Alvord in Michigan testified over an objection that, when arrested, Alvord stated, "I'm a rapist, not a . . . thief." Alvord contends that the trial court should have excluded this testimony under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because: (1) the officer did not advise Alvord of his right to have appointed counsel; (2) Alvord never signed a written waiver of his rights; and (3) Alvord's statement was involuntary because he lacked the capacity to understand what he was saying, *see Blackburn* v. *Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). The district court properly rejected these arguments.

[16, 17] In *Michigan* v. *Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Supreme Court addressed the effect of a warning faulty for the identical reason at issue here—failure to include notice of right to appointed counsel—and held that the omission did not render the statements inadmissible. The Florida Supreme Court affirmed Alvord's conviction on the basis of

20. Robey stated at the district court's hearing:

Q. Could you please describe to me the physical surroundings that you conducted your examination in?

A. Well, initially, we just stood in the hall. There was no place to talk and during this period, there was really little could be done.

After about ten or fifteen minutes, a bail bond cubbyhole became available. We used that for maybe another half hour or so and then finally one of the guards informed us that a room was available and we stayed in that until eight—until 4:15.

Q. Based on your medical qualifications in applying good psychiatric practice, do you have an opinion as to the adequacy of that physical layout when conducting a psychiatric exam to determine competency to stand trial in a triple murder case?

A. Well, I think when you add the caveat that involve a triple murder case, I would have to state that they are not only bad, they were totally unacceptable, although all that was available.

Q. Applying good psychiatric practice, do you have an opinion as to the adequacy of that particular room to conduct an examination to determine competency to stand trial and sanity at the time of the offense in a triple murder case?

A. I have such an opinion.

Q. What is that opinion?

A. It is my opinion that, given the seriousness of the charges and given the potential for the death penalty, the facilities were totally inadequate and that there should have been hospitalization.

Q. Now, are you able to tell us whether or not you could have reached an opinion as a result of your examination on January 3 and January 4, but for the fact that you have available to you access to Gary Alvord's medical records?

A. Yes, sir. I feel that without my prior knowledge of him, I could not have reached an opinion certainly in regard to criminal responsibility. In regard to competency, the major concern I had is that he might show this so-called hyper-competency syndrome of the paranoid individual who knows all the law. He doesn't really know how accurate it is, but he knows it all and is very upset about what is going on.

Had I been able to talk to Mr. Alvord either during or subsequent to my initial evaluation and go back and make another, I suspect I would have been less sure of his competency, but I had more data than anyone else and it made it easier for me, but the situation even on competency was hardly left equate.

. . . . . .

It is my opinion that while I personally don't hold any great grief for or against the death penalty, it is somehow terribly permanent and I feel it is extremely important in such cases to not only have at least three psychiatrists, but to have the opportunity made available for them to get every bit of significant data concerning the patient's whole life history and really, without a hospital setting which will also provide day to day observations, you simply can't do this in a jail setting.

Robey's testimony at the pretrial hearing demonstrates that he entertained no such reservations then. The state need not anticipate such reservations, not raised at trial, be voiced when the execution of the sentence becomes imminent.

*Michigan v. Tucker*, see *Alvord v. State*, 322 So.2d 533, 537 (Fla.1975); we agree with the Florida Court that this case and *Tucker* are indistinguishable. It is also clear that the failure of the officer to obtain a written waiver does not render the statement inadmissible. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

[18] Finally, we do not find Alvord's reliance on *Blackburn v. Alabama* persuasive. In that case the defendant was arrested and interrogated; shortly after the interrogation he was adjudicated insane. Four years later he was found competent to stand trial and his confession was admitted against him. 361 U.S. at 200–02, 80 S.Ct. at 276–77. The Supreme Court held that (despite the trial court's finding that the confession was voluntary) the confession should not have been admitted in light of substantial evidence that the defendant was incompetent when he confessed. *Id.* at 203–05, 80 S.Ct. at 278–79. We face here a different situation. The trial judge had before him substantial evidence of Alvord's competency (and of the voluntary nature of the confession). Under 28 U.S.C. § 2254(d), we must afford the finding of competency a presumption of correctness; and, in this case, nothing appears that upsets this presumption. *See generally Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

## VI. UNCONSTITUTIONAL RESTRICTION OF JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

[19] In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the "sentencer [must] not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S.Ct. at 2964 (emphasis in original). Alvord contends that the jury instructions at the sentencing hearing violated the *Lockett* rule by limiting the jury to considering only statutory mitigating circumstances. *See Washington v. Watkins*, 655 F.2d 1346, 1377 (5th Cir. Unit A 1981) (invalidating sentence on basis of faulty instructions), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The district court correctly analyzed and resolved this issue.

The judge instructed the jury in this case that the "aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence ...." and then listed the statutory aggravating circumstances. The judge then instructed the jury that the "mitigating circumstances which you may consider if established by the evidence are those ...." and then listed the statutory mitigating circumstances. In *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), Instructing the jury on aggravating circumstances, the trial judge stated, "[y]ou shall consider only the following ...," and read the statutory language. With regard to mitigating circumstances, he said, "[y]ou shall consider the following ...," omitting the word "only" and again reading the appropriate statutory language.

*Id.* at 811–12. We see no distinction of importance between the language used in *Ford* and that used in the present case. In neither situation did the trial judge commit the error present in *Washington v. Watkins*, in which the charge "operated affirmatively to preclude jury consideration of nonstatutory mitigating factors." 655 F.2d at 1377 (footnote omitted). Also, in both this case and *Ford* the judge permitted the defendant freely to introduce evidence without regard to its statutory relevance.[21] Thus, the sentence is not invalid under *Lockett*.

21. For example, the judge allowed Robey to testify that Alvord could be rehabilitated. Meyers relied heavily in this case on the statutory mitigating factor that Alvord was unable to conform to the requirements of the law as well as the extreme mental disturbance factor. Given the thrust of Meyers' defense, testimony establishing nonstatutory mitigating evidence was of limited value in any event. *See supra* note 15.



## VII. PROPORTIONALITY REVIEW

Alvord's final claim is that the Florida Supreme Court failed to conduct an adequate proportionality review in this case because the "Court's comparison make absolutely no reference to the characteristics of the offender in each prior case, comparing instead, only the facts of the crime .... In addition, [the opinion does not review] all cases of a similar nature in imposing the sentence of death." We have read the opinion of the Florida Court and we find the review beyond challenge. The Court stated:

> It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great. See *State v. Dixon* [283 So.2d 1 (Fla.1973)], *supra*. Three murders were committed while the perpetrator was engaged in the commission of the felony offense of burglary. Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. This could only be accomplished through a cold, calculated design to kill, as distinguished by a single shot from a firearm during an outburst of anger. The great risk of serious bodily harm by death to other persons is apparent, in that defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim. The murders were not committed under circumstances which defendant believed to provide a moral justification or extenuation for his conduct and his capacity to conform his conduct to the requirements of law was not impaired. His age, 26 years, had no particular significance. These aggravating circumstances outweigh any circumstances which would mitigate the sentence in this case.
>
> There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See *State v. Dixon*, *supra*. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.
>
> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.
>
> *Sullivan v. State* [303 So.2d 632 (Fla. 1974)], *supra*, involved a death sentence which was held to be appropriate by this Court. During the course of a robbery defendant abducted the victim, struck him with a tire iron, and shot him with both barrels of a shotgun in the back of the head. The defendant reloaded and discharged both barrels again into the victim's head. Just as in *Sullivan*, this case involves the commission of a burglary and the murder of the victim. The deliberate actions of Sullivan in repeatedly shooting the victim is no less heinous and atrocious than the actions of defendant Alvord in deliberately strangling three women with a rope.
>
> *Gardner v. State*, 313 So.2d 675 (Fla. 1975), was an appeal from a death sentence for the murder of a female. The murder was accomplished by the use of a

blunt instrument, the victim's body containing at least 100 bruises, abrasions and contusions. There was a massive hemorrhage of the pubic area. The victim was beaten so badly that the murder was looked upon as being especially heinous, atrocious and cruel. These aggravating circumstances outweighed any mitigating circumstances and the death penalty was upheld. Certainly, the atrocious manner in which Gardner murdered his victim is no more atrocious or heinous than the atrocious manner in which Alvord coldly strangled three females while committing his burglary.

A female victim was involved in *Hallman v. State*, 305 So.2d 180 (Fla.1974). The defendant committed the crime of robbery, cut the victim about the throat and neck with broken glass, slitting her throat and causing her death. Hallman had been convicted of two previous crimes involving an assault upon a young woman with a dangerous weapon. Alvord had been involved with the rape of a young girl in Michigan, and the evidence indicated that an assault was made upon the deceased Lynn, who was 18 years of age. The act of Hallman in cutting the victim with broken glass is no more heinous than the strangulation of three women by Alvord. Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case *sub judice*, our judgment is that death is the proper sentence.

Pursuant to Rule 6.16(b), Florida Appellate Rules, we have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause. *Alvord v. State*, 322 So.2d 533, 540–41 (Fla. 1975).

[20] Since the briefs were submitted in this case, the Supreme Court issued its decision in *Pulley v. Harris*, — U.S. ——, 104 S.Ct. 871, 78 L.Ed.2d —— (1984). In *Pulley*, the Supreme Court held that the Constitution does not require a state to conduct proportionality reviews, provided that its "capital sentencing system [is not] so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review . . . ." *Id.* at ——, 104 S.Ct. at 873. Like the California system, the Florida system requires that "special circumstances," *id.* must be found before the sentence of death may be imposed in a given case. *See generally Barclay v. Florida*, — U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The Florida system also contains other checks on the discretion of the sentencing authority so often discussed that we need not repeat them here. *See id.* Thus, in light of *Pulley*, Florida is not required to conduct a proportionality review. Alvord does not contend that he was the victim of an unequally applied proportionality review, and the review he received was as extensive as is given by the State of Florida. Thus, his attack on his death sentence on this ground is without merit.

The opinion of the district court is

REVERSED in part and AFFIRMED in part.

H.T. TRUETT, Sr., Plaintiff-Appellant,

v.

JOHNS-MANVILLE SALES CORP., et al., Defendants-Appellees.

No. 84-8008

Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

Feb. 10, 1984.

On motion to dismiss an appeal from the United States District Court for the

APPENDIX C

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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NO. 83-3345

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GARY ELDON ALVORD, a/k/a
Paul Robert Brock, a/k/a
Gary Eldon Venczel,

Petitioner-Appellee,
Cross-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent-Appellant,
Cross-Appellee.

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Appealsfrom the United States District Court for the
Middle District of Florida

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(April 25, 1984)
ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC
(Opinion February 10, 1984, 11 Cir., 1984, __F.2d__).

Before HILL and FAY, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

*Honorable Clarence W. Allgood,
U.S. District Judge for the
Northern District of Alabama,
sitting by designation.

Gary Eldon Alvord has moved that this court grant a rehearing in his case, Alvord v. Wainwright, No. 83-3345 (11th Cir. Feb. 10, 1984). In section IV of our opinion, Slip Op. at 1809-10, we concluded that the contended failure of the police officer to advise Alvord of his right to have a lawyer appointed if he could not afford one would not render his statement inadmissible. Alvord argues that Michigan v. Tucker, 417 U.S. 433 (1974), does not support our conclusion.[22a] In appraising this contention, we have made a further complete review of Alvord's trial, and we substitute the following for the second full paragraph of section IV of our opinion.

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[22a] In his petition for rehearing, Alvord points out that the Court in Michigan v. Tucker relied in part on the timing of Tucker's arrest. Tucker was arrested before the Court issued its decision in Miranda; however, because he was tried after Miranda, the decision applied at his trial. Michigan v. Tucker, 417 U.S. at 435. The Court stated that the protections of Miranda are not constitutional, but "prophylactic," id. at 439, thus causing some commentators to question the constitutional basis of the Miranda rule and its continuing vitality in habeas corpus proceedings. See, e.g., Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99, 115-25. Nevertheless, the Court also stated that"[w]e consider it significant that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda," 417 U.S. at 447, thus limiting its holding so that it does not directly govern this case. We perceive the effect of the Michigan v. Tucker case to be, at best, unclear; we therefore decide on rehearing to refuse to rely on that case. We need not address Michigan v. Tucker's applicability in this case given our present resolution of the issue.

We find both of Alvord's arguments that are directed to the adequacy and form of his Miranda warnings to be without merit. First, it is clear that the failure of the officer to obtain a written waiver in no way rendered the statement inadmissible. North Carolina v. Butler, 441 U.S. 369 (1979). Second, the record does not support Alvord's contention that the officer failed to advise him of his right to have counsel appointed if he could not afford one. The state trial court conducted a hearing, out of the presence of the jury, to determine the admissibility of the officer's testimony. There was no testimony that the officer did not give full Miranda warnings and advice. The officer stated at the hearing that he advised Alvord of his rights as follows:

Q. Okay. And did you, in fact, talk to him?

A. Yes, sir, I did.

Q. Okay. Did you advise him of his rights?

A. Yes, sir, I did.

Q. And what did you tell him regarding his rights?

A. First of all I advised him that, who I was. I advised him who I was and that I was a detective with the Police Department in Lansing. I advised him that he didn't have to talk to me, that anything he said would be used in court against him. I advised him that he had to, he had a right to an attorney. He had a right to have an attorney present before he answered any questions or made any statement.

Q. All right. Did he request to have an attorney?



A. No. sir, he did not.

Q. Did he request to remain silent?

A. No, sir, he did not.

Q. Did you or anyone in your presence promise him anything in order for him to make a statement?

A. No, sir.

Q. Did you or anyone in your presence threaten him to make a statement?

A. No, sir.

Q. Did you promise him immunity if he made a statement?

A. No, sir.

Q. Did you coerce him in any way to make a statement?

A. No, sir.

Q. Did he indicate whether or not he understood his rights?

A. Yes, sir. he told me he was aware of his rights.

Q. All right. And then what did you say to the defendant, Gary Alvord?

A. At this time I advised him that I wanted to talk to him about a safe job.

Q. Okay. What did he say?

A. Just looked at me and said, "I am a rapist, not a God-damn thief."

Q. And what did you say at that point?

A. I said, "What do you mean by that"?

Q. What did he say?

A. He then said, "I am wanted in Florida for three murders."

Q. And what did you say?

A. I said, "I thought it was two."

Q. What did he say?

A. He said, "Maybe they forgot one."

Q. And what did you say to that?

A. I looked at him and sai , "Did you do it?"

Q. And what did he respond?

A. He said, "They will have to prove it."

Q. Okay. Anything further regarding the conversation?

At this point, the officer testified that Alvord indicated that he had nothing more to say. There was no other testimony taken on the sufficiency of the Miranda warnings.

The trial judge refused to admit any testimony as to Alvord's prior misconduct (which consisted of the officer's statement that Alvord was suspected of committing a burglary) except Alvord's commept that he was a rapist. In the presence of the jury (with the exception of the burglary testimony) the officer's testimony was in all material respects the same as his testimony at the exclusion hearing.

In this habeas corpus proceeding, Alvord must prove his right to relief by a preponderance of the evidence. It is not the state's responsibility to prove that Alvord received the proper warnings; it is Alvord's responsibility to prove that he did not. Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983); Hill v. Linahan, 697 F.2d 1032, 1036 (11th Cir. 1983); Henson v. Estelle, 641 F.2d 250, 253 (5th Cir.), cert. denied, 454 U.S.



1056 (1981). Alvord relies solely on the above excerpt as proof of his contention that the officer did not advise him of his right to have counsel appointed for him. At the evidentiary hearing in the district court, Alvord made no effort to elaborate on the officer's testimony as it appears in the state transcript.[22b] From the transcript, we conclude that Alvord failed to meet his burden of proof.

The transcript demonstrates that the officer affirmatively testified that he advised Alvord of his Miranda rights. See supra italicized portion of transcript excerpt. Despite this affirmative testimony, Alvord seeks to establish that the officer did not properly repeat the warnings by relying on the officer's testimony that he informed Alvord of his "right to have an attorney present before he answered any questions or made any statement." Alvord relies, apparently, on the officer's failure specifically to mention that Alvord was entitled to appointed counsel; this does not prove that the officer did not properly inform Alvord of his rights.

The officer testified without qualification that he gave Alvord the proper warnings. The failure of the officer to use the word "appointed" when reviewing the contents of those warnings does not establish that his previous testimony was incorrect or incomplete. First, the officer did not attempt to explicitly state the warnings, and he was not requested to do so.

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22b On cross-examination, the officer reiterated that Alvord had assured him that he understood his constitutional rights.

Alvord's attorney cross-examined the officer, but never attempted to establish the deficiency Alvord now asserts. He attempted to establish other deficiencies in the warning. Second, the officer's informal reference to Alvord's "right" to counsel certainly is a clear enough shorthand method for referring to the right to counsel regardless of abili'y to pay. The officer testified to an unqualified "right" to counsel; this is not a case, as was Leathers v. United States, 396 F.2d 524, 533 (5th Cir. 1968), in which the officer testified, "we don't furnish attorneys . . . they have the prerogative to call one." Indeed, the Supreme Court, itself, has summarized the essence of the Miranda warnings in a fashion remarkably similar to that used by this officer:

> In Miranda v. Arizona, the court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. 384 U.S., at 479. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, the interrogation must cease until an attorney is present." Id., at 474.

Edwards v. Arizona, 451 U.S. 477, 481-82 (1981) (emphasis added). The officer's summary of Miranda warnings, which was as complete as the Court's, was adequate. Absent any caveat to his testimony that Alvord had been given his rights, there is no proof that he



was not. Alvord has thus failed to meet his burden of proving that he did not receive the proper warnings. With these additional observations, the petition for rehearing is

DENIED.

No member of this panel or judge in regular service on the court having requested that the cou : be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is

DENIED.

# OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL



Case No. 83-6007

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IN THE

SUPREME COURT OF THE UNITED STATES

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GARY ELDON ALVORD a/k/a PAUL
ROBERT BROCK a/k/a GARY ELDON VENCILL

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Florida Department of Corrections,

Respondent.

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

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## OPINIONS BELOW

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The Opinion of the District Court for the Middle District of Florida is reported as Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983).

The Opinion of appeal from Denial of Petitioner's Motion for Post-Conviction Relief is reported as Alvord v. State, 396 So.2d 184 (Fla. 1981).

The Opinion on direct appeal from Petitioner's convictions is reported as Alvord v. State, 322 So.2d 533 (Fla. 1975), cert denied 428 U.S. 923 (1976).

## STATEMENT OF THE CASE

Petitioner, GARY ELDON ALVORD, was charged by indictment in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, with three counts of first degree murder on August 1, 1973. This cause proceeded to trial on the indictment and on April 4, 1974, the jury returned a verdict finding Petitioner guilty as charged. Following the penalty phase of the trial, the jury returned a recommendation to the trial court that it impose the death penalty upon Petitioner under each count of the indictment. On April 9, 1974, the trial judge imposed the death penalty upon the Petitioner on each count in the indictment, and filed an order setting out his findings of fact in support of the imposition of the death sentence. Petitioner's conviction and sentence were affirmed by the Florida Supreme Court on direct appeal. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923 (1976). Petitioner next filed a motion for reduction of sentence pursuant to Rule 3.800(b), Florida Rules of Criminal Procedure in the Circuit Court in and for Hillsborough County,



Florida. The motion was presented to that court on November 29, 1976, and denied by the trial court on December 3, 1976. A petition for writ of mandamus was filed with the Florida Supreme Court and denied without hearing on March 10, 1977.

On October 6, 1978, Petitioner filed a motion for post-conviction relief in the trial court pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and on October 24, 1978, a first supplement to the motion for post-conviction relief was filed.

The denial of the motion for post-conviction relief was affirmed by the Florida Supreme Court on April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla. 1981).

A death warrant authorizing the Superintendent of Florida State Prison to execute Petitioner was signed by the Honorable Bob Graham, Governor of the State of Florida, and Petitioner was scheduled to be executed on May 6, 1981.

On April 21, 1981, Petitioner filed a Petition for leave to proceed in forma pauperis, a Petition for Writ of Heabeas Corpus pursuant to 28 U.S.C. Section 2254 and Application for a stay of execution in the United States District Court for the Middle District of Florida, Tampa Division.

An evidentiary hearing was held in this cause on May 13 and 14, 1982. On March 23, 1983, the district court entered an order setting aside Petitioner's death sentence based on the trial court's consideration of a non-statutory aggravating factor; denying habeas corpus relief on Petitioner's claims challenging the constitutionality of his conviction, and directing the State of Florida to conduct a new sentencing hearing of Petitioner in a timely fashion. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983).

Both parties appealed to the United States Court of Appeals for the Eleventh Circuit. On February 10, 1984 the Court of Appeals entered an Order reversing that portion of the district court order granting relief and affirming that portion of the

order denying relief. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). A motion for rehearing and rehearing en banc was denied on April 25, 1984, after vacating and substituting an opinion relating to the Miranda issue raised by Petitioner herein. Alvord v. Wainwright, 731 F.2d 1486 (11th Cir. 1984).

The state trial records and the transcript of the evidentiary hearings held in the district court disclose additional pertinent facts.

Petitioner was tried in 1970 for kidnapping and rape in Michigan, found not guilty by reason of insanity, and committed to the custody of the Michigan Department of Mental Health. Petitioner escaped from Michigan's Ionia State Hospital in January, 1973 and eventually made his way to Tampa, Florida. He was indicted on August 1, 1973 for the June 1973 murders of three women, and Thomas Meyers, Esquire, a part-time public defender in the Circuit Court for Hillsborough County, was appointed to represent him. Petitioner was found competent to stand trial. Petitioner plead not guilty and took the stand at trial to present an unsupported alibi defense. The state presented circumstantial evidence, a statement made by Petitioner upon his arrest, and the testimony of Petitioner's girlfriend, to whom he had allegedly confessed the crimes. Petitioner was convicted on all three counts of first degree murder.

The records disclose that Thomas Meyers, through conversations with Petitioner, ascertained that Alvord had escaped from Ionia State Prison for the mentally insane, where he had been civilly committed following an acquittal by reason of insanity from a rape and kidnapping charge in Michigan. Meyers commenced to investigate the possibility and plausibility of an insanity defense for his client. Pursuant to defense counsel's request, the trial court appointed Drs. Sprehe and Gonzalez to examine Alvord, but Alvord consistently refused to cooperate with the appointed psychiatrists and remained adamant in his desire to utilize an albi rather than an insanity defense. On October 12, 1973, Dr. Gonzalez



and Dr. Sprehe reported to the court that Alvord refused to speak with them and Mr. Meyers informed the court of his client's six year history in mental institutions. On October 19, 1973, the state attorney's office informed the court that there was a psychiatrist in Michigan who might be able to talk with Alvord regarding his competency to stand trial and whether Alvord was sane at the time of the murders. On November 2, 1973, the court issued an order committing Alvord to the Florida State Hospital for observation since he had failed to cooperate with court-appointed psychiatrists. On December 6, 1973, said order of commitment, sua sponte, was set aside and rendered null and void. On January 4, 1974, a hearing was held pursuant to the defense's motion to have Alvord examined by a psychiatrist. At that time Dr. Ames Robey, the psychiatrist from Michigan, testified that after examining Alvord, he found Alvord to be competent to stand trial and further noted that he knew more about Alvord than any other psychiatrist in Michigan. On January 9, 1974, Dr. Ames Robey presented a report to the court that "[i]n summary, an opinion is rendered that the defendant, Gary Alvord, is both competent to stand trial and criminally responsible under Florida law." On January 10, 1974, a second order issued appointing Dr. Gonzalez and Dr. Sprehe to again attempt to examine Alvord for the purpose of determining his mental condition at the time of the offense and whether he was able to stand trial. On January 11, 1974, Dr. Gonzalez and Dr. Sprehe again appeared before the court and indicated Alvord was not cooperative. Dr. Sprehe first testified that he attempted to examine Alvord on two occasions and that on both occasions Alvord had refused to speak to him. While the doctor indicated that it was too difficult to formulate an opinion as to whether Alvord was sane at the time of the crime, he did form an opinion that Alvord was able to understand the legal situation in which he found himself and that Alvord was able to assist counsel in presenting a defense. Dr. Gonzalez testified that he attempted to examine Alvord and that Alvord had

refused further examination. The trial court found Alvord competent to stand trial. On February 5, 1974, a third order issued to determine the mental condition of Alvord. On February 8, 1974, Dr. Sprehe testified that on February 6, 1974, he again attempted to interview Alvord and did speak with him for 15 minutes. Dr. Sprehe indicated that he was able to communicate with Alvord and that his opinion rendered earlier that Alvord was competent to stand trial should not be modified. Dr. Sprehe was unable to formulate an opinion as to whether Alvord was sane the day of the murders. On February 15, 1974 Dr. Gonzalez again appeared before the court and testified that Alvord was still not cooperative and in response to questioning by defense counsel further testified that in order to formulate an opinion with regard to Alvord's psychiatric condition, Alvord should be placed under 24-hour observation in a psychiatric setting in order to obtain an opinion. At said proceedings, Mr. Meyers informed the court that Alvord was incompetent to stand trial and that Alvord had been adjudicated insane in Michigan, and therefore he was incompetent to stand trial in Florida. On March 26, 1974, approximately six days prior to trial, Tom Meyers moved to transfer Alvord to the state mental hospital for observation to determine his sanity. Attached to said motion was a copy of the order of committment to the Department of Mental Health pursuant to a not guilty by reason of insanity verdict filed in the Circuit Court for the County of Washtenaw, Michigan. The motion was denied and the cause proceeded to trial.

At trial the state presented the testimony of Detective Donald Dufour, from Lansing, Michigan. Dufour had taken a statement from Alvord at the time of his arrest on unrelated crimes in Michigan. Dufour testified that he advised Alvord of his Miranda rights and the trial court found the statement to have been freely and voluntarily given.



## ARGUMENT

## ISSUE I

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS THAT DEFENSE COUNSEL IS NOT INEFFECTIVE FOR FAILING TO PREPARE AND PRESENT AN INSANITY DEFENSE WHEN THE DEFENDANT DOES NOT DESIRE SUCH A DEFENSE AND REFUSES TO COOPERATE WITH COUNSEL OR EXPERTS IN THE PREPARATION OF AN INSANITY DEFENSE DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF THE FOURTH CIRCUIT COURT OF APPEALS.

Petitioner argues that the opinion of the Eleventh Circuit Court of Appeals in the case at bar is in direct conflict with the decision of this Court in Jones v. Barnes, 463 U.S. ___, 103 S.Ct. 3308, 77 L.Ed. 2d 987 (1983) and with the decision of the Fourth Circuit Court of Appeals in Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), aff'd mem. 624 F.2d 1093 (4th Cir. 1983).[1] A review of the Court of Appeals opinion in Petitioner's case reflects that it is consistant both with this Court's recent decision in Strickland v. Washington, ___ U.S. ___, 52 U.S.L.W. 4565, 35 Cr. L. 3066 (1984) and with Jones v. Barnes.

In Strickland v. Washington this Court held that before a defendant is permitted to prevail on a claim that he was denied his Sixth Amendment right to effective assistance of counsel he must establish (1) whether counsel's allegedly deficient acts or omissions were outside the wide range of professionally competent assistance and (2) whether the act or omission was reasonably likely to have affected the outcome of the trial.[2] Id. at 35 Cr. L. Rep. 3072, 3073. In addressing defense counsel's duty to investigate potential lines of defense this Court stated:

1/ The Fourth Circuit opinion in Brennan consists solely of a memorandum affirmance of the opinion of the federal district court. Respondent questions the precedential value of this Fourth Circuit decision and would submit that it provides a wholly inadequate basis upon which to establish a conflict of decisions.

2/ Petitioner argues in a footnote that he should receive a new evidentiary hearing in the district court to allow him to establish prejudice under the Strickland v. Washington standard. Respondent would note first that the Eleventh Circuit failed to conclude that Petitioner's counsel was ineffective at the sentencing phase, Alvord v. Wainwright, 725 F.2d 1282, 1289-90 and secondly that this Court has held that the difference in prejudice standards should alter the merits of an ineffectiveness claim in only the rarest cases. Strickland v. Washington at 35 Crim L. Rep. 3074. Petitioner fails to demonstrate that his case is one of the rare.

> In other words, counsel gas a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. Id. at 30 Crim L. Rep. 3072.

In the case at bar the Court of Appeals held that Petitioner's trial counsel, Thomas Meyers was not ineffective for failing to pursue and present an insanity defense which his client did not want and affirmatively sought to prevent. Alvord v. Wainwright, 725 F.2d 1282, 1288 (11th Cir. 1984). That Court held:

> In light of Alvord's refusal to assert the insanity defense, although earnestly counseled by his defense attorney to do so, we conclude that Meyers rendered competent assistance. Further research into Alvord's background would have been fruitless because Alvord would not allow Meyers to produce evidence of insanity. The trial judge held Alvord competent -- on the unrebutted advice of two psychiatrists -- and the only psychiatrist able to form an opinion would have testified that Alvord was sane. In addition, given Alvord's competency, Meyers was ethically bound to follow his client's wishes. See *Foster v. Strickland*, 707 F.2d 1339, 1343 (11th Cir. 1983). In *Foster*, the attorney wanted to present a second-degree murder defense based on a depraved mind theory; the defendant refused to allow that defense, and this court held that the decision of the attorney to follow his client's wishes did not constitute ineffective assistance. Id. at 1289.

The Court of Appeals recognized that there might well be situations in which a client's faculties were so impaired that he could not make an informed choice. Cf. Brennan v. Blankenship, supra, however, the Court determined that Petitioner did not present such a situation.



Jones v. Barnes, supra. holds that an attorney is not required to advance every non-frivolous legal theory which his client desires to present on appeal, but may utilize his professional judgment in advancing those he feels are reasonably likely to succeed. As the district court noted in the case at bar, defense counsel's "...assumptions that success on an insanity theory would have been impossible without Alvord's cooperation was reasonable under the circumstances, and cannot now be second-guessed." Alvord v. Wainwright, 564 F.Supp. 459, 474 (M.D. Fla. 1983).

Petitioner refused to communicate with Drs. Sprehe and Gonzalez and refused to cooperate in the preparation of an insanity defense. Dr. Ames Robey, who indicated that he knew Petitioner better than any other psychiatrist, examined Petitioner and formed the opinion that he was competent to stand trial and competent at the time of the offense. Given the totality of the circumstances, defense counsel's failure to further investigate an insanity defense was reasonable. Cf. Strickland v. Washington.

Petitioner has failed to establish a conflict between the decision of the Court of Appeals in the case at bar and decisions of this Court or the Fourth Circuit Court of Appeals. The Petition for Writ of Certiorari should be denied on this issue.

## ISSUE II

THE ELEVENTH CIRCUIT COURT OF APPEALS' HOLDING THAT PETITIONER HAD FAILED TO ESTABLISH HIS CLAIM THAT HIS MIRANDA RIGHTS WERE VIOLATED IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioner argues that the Eleventh Circuit Court of Appeals in the instant case imposed a novel burden of proof by requiring him to demonstrate that he had not waived his Miranda[3] rights in the face of a silent state court record. Respondent rejects Petitioner's characterization of this issue as one in which the record is silent regarding Petitioner's waiver of his Miranda rights. Respondent would further submit that the Court of Appeals opinion on this issue is totally consistent with applicable federal law.[4]

In deciding this issue adversely to Petitioner, the Eleventh Circuit Court of Appeals made the following observations based on the existing state court records in this cause.

> The officer testified without qualification that he gave Alvord the proper warnings. The failure of the officer to use the word "appointed" when reviewing the contents of those warnings does not establish that his previous testimony was incorrect or incomplete. First, the officer did not attempt to explicitly state the warnings, and he was not requested to do so. Alvord's attorney cross-examined the officer, but never attempted to establish the deficiency Alvord now asserts... Alvord v. Wainwright, 731 F.2d 1486, 1489 (11th Cir. 1984) (emphasis supplied).

The Court of Appeals went on to note that in summarizing the Miranda warnings using the shorthand phrase "right to counsel", the officer (Detective Dufour) had paralleled this Court's own summary of the Miranda warnings in Edwards v. Arizona, 451 U.S.

3/ Miranda v. Arizona, 384 U.S. 436 (1966)

4/ The issue presented by Petitioner concerns the opinion on rehearing of the Court of Appeals in Alvord v. Wainwright, 731 F.2d 1486 (11th Cir. 1984). Respondent would also submit that the Court of Appeals resolution of this issue in its initial opinion, based on Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974) was also correct. See Alvord v. Wainwright, 725 F.2d 1282, 1298-1299 (11th Cir. 1984); Alvord v. State, 322 So.2d 533, 536-538 (Fla. 1975).



U.S. 477, 481-482, 101 S.Ct. 1880, 1883, 68 L.Ed. 2d 378 (1981) Id.

In other words, Detective Dufour testified on proffer to the trial court that he had given the appropriate warning and that Petitioner understood his rights. The trial court found the Petitioner's statements to have been freely and voluntarily given. The record on the waiver of Petitioner's right to counsel is not silent and Petitioner has never presented one shred of evidence to suggest that the state trial court's findings of fact on this issue are erroneous.[5] See Alvord v. Wainwright 564 F.Supp. 459, 485 (M.D. Fla. 1983).

The Court of Appeals' contention that Petitioner had the burden of proving his entitlement to relief and establishing the state court's findings on this issue were erroneous, is nothing more than a concise and accurate statement of the law. LaVallee v. Delle Rose, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed. 2d 637 (1973); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed 2d 722 (1981). Furthermore the cases relied on by Petitioner to establish conflict between the Courts of Appeals on this issue fail to do so.

In Williford v. Estelle, 672 F.2d 552 (5th Cir. 1982), the Fifth Circuit affirmed the denial of habeas relief on Williford's claim that an uncounseled conviction had improperly been used to enhance his sentence, agreeing with the district court that the state court records adequately demonstrated a waiver of counsel. In Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976),

5/ Although this Court's denial of certiorari in Alvord v. Florida, 428 U.S. 923 (1976) is not an ajudication on the merits, it is interesting to note that Petitione "silent record" theory on this issue has previously been before this Court. See Respondent's Appendix A.

the Fifth Circuit remanded the cause to the district court for a determination on whether Petitioner had waived his right to counsel, noting that in the face of a silent record, the state was required to establish the waiver. In Ford v. Wainwright, 526 F.2d 919 (5th Cir. 1976), the Court of Appeals granted habeas relief, finding that a state court determination that Ford had waived his right to counsel was not fairly supported by the record. Nothing in Ford, Williford or Potts suggests that the Fifth Circuit would have deemed the record in the instant case to be silent or would have, on this record, rejected the state court findings. Likewise Losieau v. Sigler, 406 F.2d 795 (8th Cir. 1969) cert. denied 396 U.S. 933 (1969) and Moore v. Ballone, 658 F.2d 218 (4th Cir. 1981) are factually inapposite to the case at bar and do not provide a basis for conflict.

A talismanic recitation of Miranda warnings is not required. California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed. 2d 696 (1981). The Court of Appeals resolution of the Miranda issue in the instant case rests on a correct legal and factual basis that is fully consistent with the holdings of this Court. This Court should deny the Petition for Writ of Certiorari on this issue also.



## CONCLUSION

Based on the foregoing arguments and authorities, Respondent submits that Petitioner has failed to demonstrate a violation of his constitutional rights or a misapplication of precedent from this Court which would entitle him to relief from this Court. Respondent respectfully requests that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Law Offices of William J. Sheppard, 215 Washington Street, Jacksonville, Florida, 32202 this 22nd day of June, 1984.

Peggy A. Quince

Of Counsel for Respondent

Case No. 83-6807



IN THE

SUPREME COURT OF THE UNITED STATES

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GARY ELDON ALVORD a/k/a PAUL
ROBERT BROCK a/k/a GARY ELDON VENCZEL

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Florida Department of Corrections,

Respondent.

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BRIEF OF OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE
ELEVENTH
CIRCUIT

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A P P E N D I X

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-



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GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No: 75-

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GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered on September 17, 1975. The opinion of the Supreme Court of Florida in this case is reported in volume 322 of the Southern Reporter, Second Series, at page 533. A copy of the opinion is attached hereto as Exhibit A.

## JURISDICTION

The judgment of the Supreme Court of the State of Florida was entered on September 17, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

Fla. Stat. Ann. §755.082 (1974-1975 supp.)
Penalties for felonies and misdemeanors

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.41 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)....."

Fla. Stat. Ann. §782.04 (1974-1975 supp.) [1/]
Murder

"(1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape,

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1/ This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974, c. 74-383, §14 (effective July 1, 1975) enacts a new § 782.04, which provides:

"782.04 Murder

(1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the

robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall consitute a capital felony, punishable as provided in §755.082.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084."

Fla. Stat. Ann. §782.07 (1974-1975 supp.)
Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §755.083, or §775.084."

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1/ Cont'd.

unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.

Fla. Stat. Ann. §784.02 (1974-1975 supp.)
Punishment for assault

"Whoever commits a bare assault is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the second degree, punishable as provided in §755.082 or §755.083."

Fla. Stat. Ann. §784.03 (1974-1975 supp.)
Aggravated Assault

"Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §778.06 (1974-1975 supp.)
Assault with intent to commit felony

"Whoever commits an assault on another, with intent to commit any capital felony or felony of the first degree shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084. An assault with intent to commit any other felony constitutes a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §921.141 (1974-1975 supp.) 1a/
Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty. Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence

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1/ Cont'd.

(3) When a person is killed in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device, or bomb,...shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

1a/ Subsection (1) of this statute was amended slightly in

may be presented as to any matter that the court deems relevant to sentence. and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7), of this section. [ 2/] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life. . . or death.

(3) Findings in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixth (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgate by the Supreme Court.

(5) Aggravating circumstances.-- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony of of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risn of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy of the unlawfu throwing, placing, or discharging of a destructive-device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

Fla. Stat. Ann. §922.09 (1973) Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

Fla. Stat. Ann. §922.10 (1973) Execution of death sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

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1a/ Cont'd.
1974 by Fla. Laws 1974, c. 74-379 of (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing on sentencing, a special jury may be summoned.

2/ The subsections setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1974-1975 supp. however, are numbered, respectively, (5) and (6).

Fla. Stat. Ann. §922.11 (1973) Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officers and guards shall be excluded during this execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body is not claimed by relatives, it shall be given to physicains who have requested if for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

## STATEMENT OF THE CASE AND FACTS

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida entered on September 17, 1975, affirming petitioner's conviction of first degree murder and sentence of death.

This case began with the filing of an indictment on August 1, 1973, charging the defendant with three counts of first degree murder (R1,2). The indictment charged that the Defendant, Gary Eldon Alvord, a/k/a Paul Robert Brack, a/k/a Gary Eldon Venczel, murdered Georgia Tully, Ann Herrmann, and Lynn Herrmann. Each of the murders was alleged to have occurred on June 17, 1973, and the Defendant was alleged to have committed each of the murders by strangling the named victim to death by means unknown to the Grand Jurors.

The Defendant had been arrested in the State of Michigan in July, 1973 on an unrelated charge and extradition proceedings were begun on August 6, 1973 by the State of Florida, (R3), which resulted in the Defendant's being returned to the State of Florida to stand trial on the above charges.

On October 9, 1973, the trial judge, on his own motion, entered an order requiring that the Defendant be examined by medical experts to determine the Defendant's mental condition on the date the murders occurred (R4). On November 5, 1973, the trial judge, again on his own motion, ordered the Defendant committed to the Florida State Hospital for further examination to determine the Defendant's mental condition at the time the murders were committed and to determine his competence to stand trial (R10,11). This order was then set aside by the trial judge by an order filed on December 6, 1973 (R14).

Up to this time the Defendant had refused to talk to the court appointed psychiatrists who had been directed to interview him. On January 3, 1974, the Defendant was interviewed by Dr. Ames Robey, a psychiatrist connected with Ionia State Hospital for the criminally insane in the State of Michigan. The Defendant was interviewed by Dr. Robey for a period of about three hours (R147), and on Janaury 4, 1974, Dr. Robey testified at a hearing held to determine the Defendant's competence to stand trial. At thi hearing Dr. Robey stated that it was his opinion that the Defendant was competent to stand trial. The trial judge again ordered the court appointed psychiatrists to examine the Defendant and set the Defendant's trial for February 25, 1974 (R173). On January 11, 1974, a further hearing was held on this matter. At this hearing the trial judge stated that he presumed the Defendant to be competent to stand trial and that since the Defendant had not shown otherwise, he was adjudicating the Defendant competent to stand trial (R189).

On February 8, 1974, a hearing was held at which the psychiatrist who had previously stated that the Defendant was competent to stand trial reiterated that opinion and indicted to the court that the Defendant had, at last, allowed the doctor to interview him (R203).

On February 15, 1974, the trial judge heard from the psychiatrist who had previously been unable to form an opinion as to the Defendant's competence to stand trial. This psychiatrist indicated that the Defendant had persisted in his refusal to talk with him, and that he still could not form an opinion as to the Defendant's competence to stand trial.

On January 22, 1974, the Defendant filed a pro se motion requesting change of counsel which was denied (R27-30), and the Defendant's attorney, who had sought and obtained the normal discovery permitted by the Florida Rules of Criminal Procedure (R5-7,8,9,21-22, 23-26, 43,44, 53,61,62,68,76,77,83,84) filed a motion for change of venue on the Defendant's behalf citing the extensive, prejudicial pretrial publicity given to the case (R31-41). The trial judge reserved ruling on the motion for change of venue until after jury selection had begun (R94,195,225).

On February 4, 1974, the Defendant's attorney filed motions to suppress the State's physical evidence seized from the Defendant (R49,50) and any admissions or confessions elicited from the Defendant by agents of the State (R51,52).

On March 26, 1974, the Defendant's attorney filed a motion for discharge alleging that the State had failed to bring the Defendant to trial within 180 days of taking him into custody (R69).

On March 26, 1974, the Defendant's attorney also filed a motion to have the Defendant committed to the Florida State Hospital for observation for a period of at least 90 days so that the court could have a more accurate appraisal of the Defendant's mental condition before making a determination of the Defendant's mental condition. Both motions were denied on March 28, 1974 (R70,71-75).

On March 28, 1974, the Defendant's attorney filed a motion to dismiss the indictment which challenged both the composition of the grand jury which handed down the indictment and the constutionality of the Florida death penalty statute (R78-82).

On April 1, 1974, the case came on for trial before a jury. Before beginning the selection of the jury, however, the Defendant's attorney renewed his previously denied motion for discharge which the trial judge again denied (R232).

The trial then proceeded from April 1, 1974 through April 4,

At the trial the State called numerous witnesses in proving what was essentially a circumstantial case against the Defendant. The defense, in turn, called only the Defendant. The material facts as testified to by the witnesses are as follows:

In the early afternoon of Monday, June 18, 1973, the bodies of three women were discovered in a home in Tampa, Florida. The three women were Georgia Tully, Ann Herrmann, and Lynn Herrmann.

The home where the three women were found was owned by Ann Herrmann. Georgia Tully was Ann Herrmann's mother. Georgia Tully was living in Georgia but had come to Tampa about a month earlier to visit with her daughter. Lynn Herrmann was the 18 year old daughter of Ann Herrmann, and she lived at home with her mother.

Each of the three women was found dead in a separate room in the house (R607), and each of the women had been strangled with a piece of cord (R572,648)). A vaginal test on Lynn Herrmann showed the presence of semen, although, aside from a slight abrasion on the right side of her head, there was no evidence that she had been sexually assaulted prior to being murdered (R570).

The front door of the house had been kicked open and the condition of the house tended to indicate that the murderer burglarized the house either before or after the three women had been murdered (R649,650).

The time of death was tentatively established as occurring somewhere between 11:00 AM, Saturday, June 16, 1973, (R587) and 1:30PM, Monday, June 18, 1973 (R606).

The evidence tending to connect the defendant with the murders consisted of the following:

First. While the State maintained that the murders were committed during the course of a burglary of Ann Herrmann's home, the State also offered evidence tending to show that the Defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the Defendant had stated to her quite a few times that he disliked Ann Herrmann (R745,747), and Jeanine Brautigan testified that about a month before the murders were committed the Defendant told her he could or would choke Ann Herrmann (R717).

Second. The State introduced evidence tending to show that the Defendant had some of Ann Herrmann's jewelry in his possession after the date of the murders. Robert Bernstein who had dated Ann Herrmann for about 8 months, testified that he had given Ann Herrmann a blue, electric cigarette lighter with gold trim which was approximately 1 1/2" to 2" high (R609,610). George Valahakis, Ann Herrmann's ex-husband then testified that he had given Ann Herrmann a wedding ring and an engagement ring. The wedding ring contained a pear shaped diamond, and the engagement ring consisted of a diamond in the center surrounded by smaller diamonds. Mr. Valahakis also testified that he had given Ann Herrmann a Bulova, lady's watch, white-gold in color, with diamonds on each side of the watch where the band joined the watch. The band also white-gold in color and it was an expandable type band (R680,681).

The watch, the rings, and the lighter were never recovered and were not introduced in evidence at the trial. The State did, however, present testimony that the Defendant had similar appearing jewelry in his possession shortly after the murders were committed. Zelma Hurley testified that the Defendant had a gold and purple cigarette lighter, a pear shaped diamond ring, a ring with diamonds set in it in a flowered design, and a woman's watch with a small face and a stretch band in his possession on their trip to Pennsylvania shortly after the murders had been committed (R757,758). Terri Williams who had seen the Defendant in Detroit, Michigan on June 25, 1973, testified that the Defendant had in his possession at that time a small woman's diamond watch with a stretch band (R881).

Third. The State introduced evidence tending to show that some physical evidence matching that found at the scene of the murders was later found in the apartment shared by the Defendant and Zelma Hurley.

The police found a short piece of rope in the apartment which was the same type of rope used to strangle the women (R869), and a shirt which Zelma Hurley stated belonged to the Defendant was found in the apartment. The shirt had a small quantity of blood on it, but laboratory analysis could not identify it as to type or even identify it as human blood.

Fourth. The State introduced evidence indicating that the Defendant had possession of a gun before and after the murders were committed. Charles Harpe, the manager of the Gold Triangle Sporting Goods Store in Tampa, testified that his log of ammunition sales showed a sale to Paul Robert Brock, and Daniel Hernandez, a salesman at the store, stated that he had made the sale of .38 caliber bullets to Paul Brock on June 16, 1973. He tentatively identified the Defendant as Paul Brock (R674). Frank Dalia then testified that the Defendant sold him a .38 claiber pistol and a box of shells for $25.00 to raise money so that the Defendant could go up north to see his sick father (R687).

Fifth. The evidence on which the State primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the State was subordinate in importance to Zelma Hurley's testimony; and Zelma Hurley's testimony provided the basis for much of the State's other evidence allegedly linking the Defendant to the murders. It was Zelma Hurley who claimed that the Defendant had in his possession a watch, a lighter, and two rings which appeared to correspond in appearance with those owned by Ann Herrmann; it was Zelma Hurley who testified that the Defendant had manifested a dislike for Ann Herrmann prior to the commission of the murders; and it was Zelma Hurley who contacted the police and showed them where in the apartment she had shared with the Defendant they could find the pieces of cord and the Defendant's shirt.

Zelma Hurley was the Defendant's girlfriend and had lived with the Defendant from January, 1973, until they split up in July of 1973 (R743).

On the night of Saturday, June 16, 1973, the Defendant and Zelma arrived home, and, according to Zelma, the Defendant drove off alone about 1:30 AM (R748,749). The Defendant was gone all night and came back into the apartment at about 6:30 the next morning (R749). When Zelma Hurley got up, she observed that the Defendant had over $100 in cash on his person. She saw a $100 bill and a torn half of a dollar bill (R751). The Defendant was not working at that time.

That night, according to Zelma, the Defendant told her "I had to rub out three people last night, Zelma." When she asked him who they were, the Defendant replied that it was "Ann and Lynn and her mom" (R753).

According to Zelma Hurley, the Defendant then went on and told her the details of the murders. He first said he had gone to "Ann's house to rub them out" and that he had gotten in the house by kicking the door in (R754).

The Defendant said that he first put the three women in separate rooms and that he then decided not to shoot the women because that would make too much noise but to strangle them instead (R755). The Defendant also stated that he did not want to kill the old lady because he liked her, but he felt that he couldn't leave any witnesses (R754,755).

He also said that he wore gloves to avoid leaving any fingerprints and that after he had killed the women, he took money, a lighter, two rings and a watch (R755).

According to Zelma Hurley, the Defendant told her that he had to get out of town because of the incident, and he and Zelma thereupon left Tampa for Pennsylvania with Zelma's young son (R756). It was on this trip that Zelma Hurley allegedly saw the watch, the rings, and the lighter.

On cross-examination Zelma Hurley stated that she had believed the Defendant's statements to her about killing the three women, and that she was afraid of the Defendant, but acknowledged that she had gone to Pennsylvania with the Defendant and remained with him for almost a week before returning to Tampa. Zelma Hurley further admitted that she never told anyone, even her twin sister, what the Defendant had told her and that she had left her son in Pennsylvania with the Defendant when she flew back to Tampa.

Zelma Hurley testified that she had gotten in contact with the police upon arriving back in Tampa, but by the time she gave her statement to the police, she had already heard the details of the murders from her friends. In addition, she acknowledged that she was taking drugs at the time the Defendant allegedly told her about his having murdered Ann Herrmann, her mother, and her daughter, and she further acknowledged that she did not give the police a statement implicating the Defendant in the murders until after the police and prosecutor threatened to charge her as an

accessory to murder unless she told them what they wanted to know.

In answer to the State's case the defense presented only the testimony of the Defendant.

The Defendant denied having committed the murders (R955). He stated that he and Zelma Hurley had gone out Saturday night drinking, and the he took Zelma home and went back out (R957,958). During this time he had been drinking heavily and smoking marijuana and became very intoxicated (R960). When he left the Davis Island Bar, the Defendant drove back to the apartment where he and Zelma Hurley lived and spent the rest of the night passed out in the car (R961).

The Defendant admitted selling his gun to Frankie Dalia for $25.00 but denied showing Zelma a $100 bill or a torn $1 bill Sunday morning (R963), and denied showing her a cigarette lighter or the two diamond rings on the way to Pennsylvania (R970). He did admit that he owned a watch and had showed it to Zelma Hurley and Terri Williams but he denied that the watch had come from Ann Herrmann and he stated that the watch he had did not have diamonds in it.

At the conclusion of the trial proper the jury returned a verdict finding the Defendant "guilty as charged in the indictment" (R88).

At the penalty phase of the trial, Dr. Ames Robey was called to testify as to the Defendant's history of emotional difficulties, and his prior criminal record. The jury then retired and recommended to the court that it impose the death penalty upon the Defendant under each count of the indictment (R89).

On April 9, 1974, the trial judge imposed the death sentence upon the Defendant on each count in the indictment (R100,101) and filed an order setting out his findings of fact in support of the imposition of the death sentence (R97-99).

On May 10, 1974, the Defendant filed a timely Notice of Appeal seeking review of his judgment and sentence (R120) and on May 13, 1974, an order was entered appointing the Public Defender's Office of the Twelfth Judicial Circuit to aid and assist in the preparation and presentation of the Defendant's appeal (R126).

On September 17, 1975, the Florida Supreme Court affirmed the Defendant's conviction (Exhibit 'A' in Appendix).

Petitioner filed a timely petition for rehearing, which was denied by the Florida Supreme Court in an order filed December 15, 1975, (Exhibit 'B' in Appendix).

Petitioner filed his motion for stay of execution which was granted by the Florida Supreme Court in an order dated January 5, 1976, to and including January 26, 1976.

On January 24, 1976, the Petitioner applied to this Court for an extention of the stay of execution granted by the Florida Supreme Court on January 5, 1976. This Court granted a stay of execution until the time for filing a petition for writ of certiorari expired or until the petition was disposed of.

Under Rule 22 (1) of this Court, Petitioner had (90) days from the date of the denial of his request for rehearing in the Florida Supreme Court to file a petition for certiorari with this Court unless an extention of that time is granted. The last day for filing a petition for Petitioner for Writ of Certiorari with this Court was March 15, 1976.

On March 3, 1976, Petitioner filed with this Court his request for an extention of time. The Court granted an extention of time to and including April 15, 1976 by order dated March 8, 1976.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1-A,B The questions presented in this Petition as 1-A,B challenging the constitutionality of the Florida death penalty statute were first raised in the trial court in the Defendant's Motion to Dismiss Indictment (R78-82) which was denied by the trial judge. The questions were again raised before the Florida Supreme Court in the Defendant's Brief as the following points:

> Point I. The Imposition of the Death Sentence Pursuant to Fla. Stat. §775.082, 782.04 and 921.141 Contravenes the United States and Florida Constitutions.

I-C The points presented herein as Petitioner's Point I.C was first presented to the Florida Supreme Court in the Petitioner's Brief as point number II as follows:

> Point II. The Provision of the Florida Statutes Allowing a Jury to Render An Advisory Opinion on the Question of the Sentence to be Imposed in an Capital Case by a Simple Majority Vote Violates the Defendant's Right to a Trial by Jury as Guaranteed by the Florida and United States Constitutions.

This point was also specifically considered and decided adversely to the Petitioner by the Florida Supreme Court.

II. The question contained herein as Issue II was first presented to the trial court in the Defendant's Motion to Suppress a Confession or Admissions illegally obtained (R51-52) which was determined adversely to the Defendant. The specific statement was considered by the trial court during the trial during a voir dire examination of the witness Detective Dufore and after hearing all of the testimony, the trial judge ruled that the statement was properly obtained and allowed it to be presented to the jury.

The question was presented to the Florida Supreme Court in the following manner in the Defendant's Brief as follows:

> Point III The Trial Judge Erred in Permitting Detective Don Dufore to Relate the Statements allegedly Made to Him by the Defendant.

This issue was also decided adversely to the Petitioner by the Florida Supreme Court in it's Opinion which specifically held that the statement given to Detective Dufore by the Petitioner did not violate the standards enunciated by this Court in Miranda v. Arizona.

Points I C and II above were also presented again to the Florida Supreme Court by way of a Petition for Re-Hearing which was timely filed subsequent to the Court's opinion which was also determined adversely to the Petitioner.

## QUESTIONS PRESENTED

I. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendments to the Constitution of the United States.

A. Whether the death penalty is per se cruel and unusual punishment in violation of the strictures of the Eighth and Fourteenth Amendments to the United States Constitution.

B. Whether the Florida Statute prescribing the method by which the penalty of death may be rendered in capital cases violates the standards enunciated by this Court in Furman v. Georgia, 408 US 238 (1972).

C. Whether the Florida Statute allowing a jury to render an advisory verdict on the penalty to be imposed upon an accused capital defendant violates the defendant's right to a trial by jury as secured by the Sixth and Fourteenth Amendments to the United States Constitution.

II. Whether the admission in evidence of a statment made by the Defendant in the course of his interrogation by an agent of the State who did not first give the Defendant his full Miranda warnings violates the Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

## REASONS FOR GRANTING THE WRIT

I. WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. WHETHER THE DEATH PENALTY IS PER SE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE STRICTURES OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

B. WHETHER THE FLORIDA STATUTE PRESCRIBING THE METHOD BY WHICH THE PENALTY OF DEATH MAY BE IMPOSED IN CAPITAL CASES VIOLATES THE STANDARDS ENUNCIATED BY THIS COURT IN FURMAN V. GEORGIA 408 U.S. 238 (1972).

The issues presented in I.A. and I.B. above have been fully presented to this Court at great length in several cases now before the Court for decision. In order to aviod burdening the Court with lengthy and repititious matter, therefore, the Petitioner will simply adopt and incorporate herein the reasons and the authorities cited in support thereof on the same points in the Petition for Writ of Certiorari to the Supreme Court of Florida filed in the case of Profitt v. Florida Case No. 75-5706. The issue was stated in the petition in the case of Profitt v. Florida, supra, as follows;

> WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

IC.

WHETHER THE FLORIDA STATUTE ALLOWING A JURY TO RENDER AN ADVISORY VERDICT ON THE PENALTY TO BE IMPOSED UPON AN ACCUSED CAPITAL DEFENDANT VIOLATES THE DEFENDANT'S RIGHT TO A TRIAL BY JURY AS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is fundamental that in all criminal prosecutions the accused has a right to a trial by an impartial jury of his peers. This right is guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution, Duncan v. Louisiana 391 US 145, and in Florida that right is guaranteed by Article I, Section 16 of the Florida Constitution.

In the State of Florida the right to trial by jury carries with it the right to a unanimous verdict. The Florida Statute which authorizes imposition of the death sentence in capital cases, however, permits the jury to return an advisory verdict on the sentence to be imposed upon the accused and that verdict may be rendered by a simple majority of the jury.[3/]

To the extent that Florida law permits the jury to make a life or death decision by simple majority vote, it violates the Defendant's federally guaranteed right to trial by jury. In Johnson v. Louisiana 406 U.S. 356 this Court in a five to four decision upheld a Louisiana statute which allowed a conviction to be entered in certain felony cases upon a nine to three plurality verdict. In holding that the Fourteenth Amendment's requirement of due process did not require a unanimous verdict, this court pointed out that the Louisiana statute required the concurrence of a 'substantial majority'

3/ Fla. Stat. §921.414 (2) provides:
(2) Advisory sentence by jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the Court, based upon the following matters:

(c) Based on these considerations, whether the defendant should be sentenced to life (imprisonment) or death.

Fla. Stat. §921.141 (3) provides:

(3) Findings in support of sentence of death. Norwithstanding the recommendation of a majority of the jury...



of the jurors. In a concurring opinion by Justice Blackman, it was pointed out that the nine to three Louisiana vote constituted the vote of seventy-five per cent of the jurors and that concurring opinion went on to state:

> I do not hesitate to say, either, that a system employing a seven to five standard, rather than a nine to three or seventy-five per cent minimum, would afford me great difficulty.

Despite this clear admonition by this Court, the Florida death penalty statute has been drafted in such a way as to permit just such a seven to five majority verdict on the most important issue in the trial, i.e. the question whether the defendant lives or dies. Such a constitutional anomoly cannot be permitted.

It should be noted that the majority advisory sentencing opinion permitted by Florida Statute 921.141 is the only instance where a majority jury verdict is permitted by Florida law. In all instances where a jury trial is accorded in civil actions the jury verdict must be unanimous. In condemnation cases, the accused is accorded a trial by twelve jurors and the jury must determine by unanimous vote 1) that the governmental entity involved has the right to take the defendant's property; and 2) the amount of the compensation which that governmental entity must pay to the defendant.

In all criminal cases, the defendant is accorded a six-man jury except in capital felonies. In capital felonies, the defendant is accorded a twelve-man jury and the verdict of the jury must be unanimous on the question of guilt or innocence.

The majority advisory verdict scheme condoned by Florida statute, therefore creates the following strange anomoly. A litigant in a civil action who risks losing only his property, or some part of it, is assured that before his property is taken from him by

judicial sanction all six or twelve jurors will be in full agreement that he has been guilty of the wrongdoing ascribed to him. In addition, the amount of the compensation which he is required to pay to another, is also determined by unanimous vote of the jurors. On the other hand, a criminal defendant who is charged with a capital crime and thus risks the loss of not merely his property but his life, finds that he is afforded less protection than a routine civil litigant. Granted, the jury determines the defendant's guilt or innocence by a unanimous verdict of its members. The question whether the defendant lives or dies, however, is often at least as important to the man on trial as the question whether he is to be convicted or acquitted. In fact, in cases where the State's proof is great, the question whether the defendant lives or dies may be the only meaningful determination made by the jury.

It will be argued, of course, that the jury's recommendation is in the nature of an advisory opinion only, and that since this finding can be ignored by the trial judge, it need not be made with the same formality as is required for a 'verdict' as such. Such an argument misses the mark however.

After the legislature passed Florida Statute 921.141, an attack was made upon the statute as violating the tenants set forth by this Court in Furman v. Georgia, supra. A circuit judge before whom a capital indictment was then pending, certified the constitutionality of the new Florida death penalty statute to the Supreme Court as a question of great public interest. The Court thus considered the statute in the abstract with no conviction then before it. In that case, the Florida Supreme Court sustain the constitutional validity of the statute and reasoned that such discretion as remained in the jury in determining the sentence to be imposed would be circumscribed by judicial review, first by review by the trial judge, then review of his actions by the Florida Supreme Court. In sanctioning the statutory scheme, however, the Court strongly indicated



that the jury's recommendation would be given great weight and would only be disregarded by trial judges in extreme cases where the penalty of death was clearly the more appropriate penalty. See State v. Dixon 283 So. 2d. 1

It should be paranthetically noted at this point that the theory enunciated by the Florida Supreme Court in State v. Dixon, supra, did not comport with later experience. In about half of the cases which reached the Florida Supreme Court, the trial judge had overridden the jury's recommendation of life and instead imposed the death penalty upon the defendant and in about half of those cases, the Florida Supreme Court had upheld the imposition of the death penalty by the trial judge. The reasoning of the Florida Supreme Court in these latter cases was that the trial judge had before him information which the jury did not have, such as a pre-sentence investigation. In so holding, the Florida Supreme Court has managed to deny certain capital defendants a trial by jury on the penalty issue altogether and by giving virtually unfettered discretion to the trial judge, has replaced the discretion of twelve of the defendant's peers chosen at random from a cross section of the community with the discretion of one person, i.e. the trial judge.

In an effort to bring the practical application of the Florida death penalty statute back into line with the requirements of Furman v. Georgia, the Court in the case of Tedder v. State 322 So. 2d. 908 (1975) announced its policy to be as follows:

> A jury recommendation under our trifurcated death penalty statute should be given great weight.In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

In its effort to avoid the arbitrary discretion inherant in the system provided by the Florida death penalty statute and condemned in Furman v. Georgia, the Florida Supreme Court has

effectively negated any valid argument that the jury's penalty verdict is advisory in nature only. Rather,the Court has mandated that the jury's verdict is to be the final word in all but a very few cases. Since that word can be rendered by a smiple majority vote of the jurors and since it deals with an aspect of the prosecution of such great magnitude to both the defendant and the State, the statute permitting this procedure,therefore,violates the Petitioner's constitutional right to a trial by a jury of his peers and this Court should issue the writ of certiorari to review the decision of the Florida Supreme Court in upholding the statute.



II.

WHETHER THE ADMISSION IN EVIDENCE OF A STATEMENT MADE BY THE DEFENDANT IN THE COURSE OF HIS INTERROGATION BY AN AGENT OF THE STATE WHO DID NOT FIRST GIVE THE DEFENDANT HIS FULL MIRANDA WARNINGS VIOLATES THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the course of its direct case, the State presented the following testimony by Detective Don Dufore of the Lansing, Michigan Police Department:

Q. All right. And would you relate to the jury the conversation that you had with the defendant on that day?

A. I told Mr. Alvord that I wanted to talk to him about another matter.

Q. And what did he say to you?

A. His reply was, "I am a rapist, not a God-damn thief."

Q. And what did you say to that?

A. I asked him what he meant by that.

Q. And what did he say?

A. He said, "Iam wanted for three murders in Florida".

Q. And did you respond to that?

A. Yes, sir, I did.

Q. And what did you say?

A. I said, "I thought it was two."

Q. And what did he say, if anything?

A. He said, "Maybe they forgot one."

Q. And did you respond to that?

A. I looked at him and said, "Did you do it."

Q. And what did he say?

A. He just smiled at me and said, "They have got to prove it."

Q. Was there any further conversation with him?

A. No, sir. His next statement was that he didn't want to make any further statements to me.

Prior to the trail, the defendant had moved to suppress all statements made by the Defendant to agents of law enforcement. The statement by Detective Dufore, however, was unknown to the defense and Detective Dufore was not available to be deposed until just before the trail. Because of this the trial judge, before permitting Detective Dufore to give the above testimony, required the State

to first profferhis testimony out of the presence of the jury. Having heard this testimony, the Court then ruled that it was admissible and allowed him to repeat it in the presence of the jury.

In both his testimony during the voir dire examination by the prosecutor and in his testimony before the jury, Detective Dufore stated he had advised the Defendant of his constitutional rights before questioning him. Detective Dufore then went on to state specifically the rights that he had advised the Defendant of before questioning him. Those rights were as follows:

> First of all I advised him that, who I was. I advised him who I was and that I was a detective with the Police Department in Lansing. I advised him that he didn't have to talk to me, that anything he said will be used in court against him. I advised him that he had to, he had a right to have an attorney. He had a right to have an attorney present before he answered any questions or made any statement.

At neither time did Detective Dufore state that he had advised the Defendant that an attorney would be appointed to represent him if the Defendant could not afford to hire an attorney before any questioning took place. The record further shows that the Defendant was,in fact, indigent and was represented by appointed counsel both at the trial level and the appellate level.

This Court held in the case of Miranda v. Arizona 384,US 436 (1966) that the police before interrogating a suspect must advise him of certain rights. Those rights which have since come to be known as a suspect's Miranda rights consist of four things. The suspect must be warned 1) that he has an absolute right to remain silent; 2) that anything that he says can and possibly will be used against him in a court of law; 3) that the suspect has the right to have his attorney present with him before any questioning; and 4) that if he cannot afford to hire an attorney ,one will be appointed for him without charge before any questioning takes place.

In addition to warning a suspect of the above rights, the police officer questioning him must then determine that the suspect has understood the rights given him and then must illicit a



completely voluntary waiver of those rights before questioning the suspect.

In no case ever decided by this Court has it been held that giving three out of four of the Miranda warnings constitute sufficient compliance with Miranda v. Arizona, supra, In fact, in Michigan v. Tucker 417 US 433 (1974) this Court held just to the contrary.

In Michigan v. Tucker, supra, the police officer who was questioning Tucker gave him the same identical rights given the petitioner in this case. In both cases, the police officer totally failed to advise the Defendant that he had a right to have an attorney appointed for him before any questioning took place, if he, in fact, was indigent and unable to afford an attorney. The remedy where full Miranda rights have not been given prior to the eliciting of an incriminating statement is the exclusion of the statement as evidence, Miranda v. Arizona, supra.

In dealing with this issue, the Florida Supreme Court cited Michigan v. Tucker, supra, for the proposition that Miranda v. Arizona, supra, no longer required exclusion of a statement made after the police had failed to adequately advise a suspect of his constitutional rights. In so holding, however, the Florida Supreme Court misread, or misapplied, the holding of this Court in Michigan v. Tucker, supra.

The defendant in the Tucker case was a rape suspect who was arrested by the police before the United States Supreme Court decided Miranda v. Arizona, 384,US 436,86 S. Ct. 1602, 16 L. Ed. 2d, 694 (1966). During the course of his interrogation, the Defendant gave the police the name of an alibi witness whom the police interviewed and whom the State later called as a witness on its direct case. At trial, the Defnedant's attorney moved to exclude the testimony of this witness on the ground that the witness' name had been revealed during the course of a statement

which was not preceeded by the proper Miranda warnings.

The facts in Michigan v. Tucker, supra, thus differ from the facts in the case sub judice in the following particulars:

A. At the time Tucker gave his statement, he was given all the warnings that the law required him to be given, since Miranda v. Arizona, supra, had not been decided at that time. The conduct of the police officers was eminently proper and legal at the time they interrogated Tucker.

B. The State did not, as in the case sub judice, use Tucker's statement against him. In that case the State merely made use of a witness whose name had come to light through the Defendant statement. The evidence so used was, thus, derivatory only in natur

An examination of the facts in the Tucker case show that the equities were clearly with the State, given the unique factual setting of the case. It was that fact that prompted the Court to refer to the standards set out in Miranda v. Arizona, supra, as "prophylactic standards". Nothing in the Court's opinion departs in any way from the basic requirements of Miranda. Rather, the Court concluded that the sanction of exclusion of otherwise probative evidence was unwarranted in that case, since the officers had done all that was required of them by the law at the time they interrogated the defendant. As the Court stated at page 447 of its opinion:

> "We consider it significant that the officer's failure to advise the respondent of his right to appointed counsel occurred prior to the decision n Miranda."

The protective sanctions created by Miranda v. Arizona, supra, are not vitiated by the fact that the Defendant may have had an otherwise fair trial. The violation of his constitutional rights, without more, requires a reversal of the Defendant's conviction.

See Michigan v. Mosley, 96 S. Ct. 321 (1975) where this Court affirmed the continuing validity of its prior decision in Miranda v. Arizona, supra, and cited Michigan v. Tucker, supra, as supporting



the following proposition of law:

> "In sum, the Court held in that case that unless law enforcement officers gave certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary."

Barring the complete abandonment of the principles enunciated in Miranda v. Arizona, supra, and the application of the exclusionary rule to statements obtained in violation of Miranda, this Court must grant the writ of certiorari to the Florida Supreme Court and must reverse the Petitioner's conviction for a new trial free of the taint of the offending statement.

## CONCLUSION

For the foregoing reasons and founded upon the authorities cited, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari sought herein.

Respectfully submitted,

JAMES A. GARDNER
PUBLIC DEFENDER

By Richard W. Seymour
Richard W. Seymour
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to the Attorney General's Office, Tallahassee, Florida 32304, by mail, this the 14th day of April, 1976, and to Gary Eldon Alvord, State Prison.

Richard W. Seymour

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
No.

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GARY E. ALVORD,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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## PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI



The Petitioner, who has been sentenced to death for first degree murder (see Alvord v. State, 322 So. 2d. 533 (Fla. 1975) respectfully moves this Court for an order vacating its July 6, 1976 denial of his petition for writ of certiorari.

The denial of certiorari in this case undoubtedly rests, in part, on the identity of the Eighth Amendment issue presented with that presented in Proffitt v. Florida, 44 U.S. L.W. 5256 (U.S., July 2, 1976). On July 16, 1976, a rehearing petition was filed in Proffitt, seeking reconsideration by the Court of narrow but literally vital questions about the retrospective application of the principles announced in the five July 2 capital-punishment decisions to the particular Florida death-sentencing procedures used in Proffitt's case and in petitioner's. Petitioner therefore respectfully requests rehearing of the denial of certiorari in his case coincidentally with the Court's consideration of the rehearing petition in Proffitt and based upon the reasons set forth in that rehearing petition.

In addition to the Eighth Amendment questions presented for reconsideration by this Court, Petitioner would also seek reconsideration of the Court's refusal to consider the Miranda issue presented in Point II of the Petition for Writ of Certiorari. Since the Court's denial of the Writ was made in a per curiam

opinion, Petitioner is uncertain of the particular reasons that prompted the Court to deny the Writ, but must assume that the gounds upon which the Court based its denial of the Writ were coincident with the points presented by the respondent in its Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida. The Petitioner will, therefore, accordingly address himself to those points made by the Respondent on this issue.

A. The Respondent asserts that Michigan v. Tucker 417 US 433 (1974) leaves open the question whether Miranda v. Arizona 384 US 436, 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966) today requires that an accused be advised that an attorney will be appointed for him free of charge, if he so desires, before any questioning takes place. In reading Tucker v. Michigan, supra, as it does, however, Respondent has ignored the many pronouncements of this Court affirming the continuing vitality of Miranda, the latestof which occurred a little over a month ago in Doyle v. Ohio 96 S. Ct. 2240 (1976).

In reading Tucker v. Michigan, supra, as allowing the police to dispense with the so-called Fourth Miranda warning, the Respondent seeks to eviscerate Miranda. It should be borne in mind that Miranda v. Arizona, supra, was decided as it was in order to redress the inequality that pertained between the indigent accused, and the accused who was financially able to afford his own counsel. See Escobedo v. Illinois.

The so-called fourth wafning of Miranda is the very heart of the Miranda since it is the protection afforded by this warning that accords the indigent accused the same panoply of legal protection as is accorded his more fortunate breatheren by Escobedo v. Illinois.

B. The Respondent next recites that "the decision herein is within the rationale of Tucker", and then goes on to attempt to classify the defendant's statement "I'm a rapist, not a God-damn thief" as a volunteered rather than simply a voluntary statement.

This line of reasoning is, at best, tenuous, since the Petitioner was being questioned about some safe burglaries in Michigan when he made the above statement, and the statement was, for the most part, responsive to the question he was asked. In any event, however, the Petitioner was then specifically questioned about the Florida murders by Detective Dufore, and in the course of responding to these inquiries gave responsive answers that were far more damaging to the Petitioner than the rapist remark. Thus, even if the Respondent's reasoning was correct as to the Petitioner's initial response, the balance of his statements to Detective Dufore were, clearly, improperly admitted.

C. The Respondent asserts that "the absence of timely and proper objection in the trial court could have prevented consideration of this point in the Florida Supreme Court..". The record shows, however, that the Petitioner filed a Motion to Suppress any statements made by the Defendant to "agents of the State of Florida" (R-51,52) The statement to Detective Dufore, however, was not known to the Petitioner until just prior to trial. At trial objection to the statement was entered and the witness was examined out of the presence of the jury in order that the trial judge could satisfy himself that the necessary predicate was laid for admission of the statement in evidence.

In addition, it should be noted that regardless of what grounds the Florida Supreme Court may have had to have declined to review the issue, that Court did in fact consider and directly rule on the issue, thus properly preserving the question for review by this Court.

D. The Respondent asserts that there was no showing in the trial court that the Petitioner was, in fact, indigent when he was questioned by Detective Dufore. In support of this contention, the Respondent points to the testimony that the Petitioner drew social security which he gave to his wife and that he could always get money from his parents (R-995,996). It is an undisputed fact, however, that the Petitioner has met and continues to meet the Florida test of insolvency, and has been represented by appointed counsel at both the trial and appellate level. This is so, even though the Petitioner still received a modest social security payment which goes toward the support of his wife. The record, there-

fore, contains nothing to show that the Petitioner had access to sufficient funds to hire an attorney to represent him while being questioned by Detective Dufore. In fact, quite the opposite appears from the record, since the Petitioner had to sell his gun for $50.00 to raise the money to travel from Florida to Pennsylvania, and had been out of work since he left Florida. The record thus shows sufficient indigency on the Petitioner's part to have required that Detective Dufore advise him of his right to appointed counsel before questioning him about his suspected involvement in a triple murder.

E. The Respondent suggests that the so called fourth Miranda warning may have actually been given and Detective Dufore may have simply forgotten to relate that in his testimony. This suggestion, however, strains credulity, since this was an important first degree murder trial which was carefully prepared for by the State, and since Detective Dufore twice testified (outside the presence of the jury, and with jury present) as to the conversation that occurred between him and the Petitioner. Under the circumstances, the Petitioner's attorney was not required to put the words in Detective Dufore's mouth by way of leading questions and have him spit them out before the record can be said to show that the requisite warnings were not given.

F. Finally the Respondent asserts that the admission of the Petitioner's statement in evidence, if error, was harmless error, and he then cites Milton v. Wainwright 407 U.S. 371 (1972).

The facts in Milton v. Wainwright, supra, however, make the principle ennunciated there totally inapplicable to the case sub judice. An examination of the facts in the two cases show why.

In Milton v. Wainwright, supra , a police officer posed as a prisoner and elicited a confession from the petitioner who was then being held in jail on a first degree murder charge. After conviction, the petitioner filed a habeas petition in the Federal District Court asserting that the confession in question violated the dictates of Messiah v. U.S. 377 U.S. 201, 84 S. Ct. 1199 12 L. Ed. 2d. 246 (1964).

This Court affirmed the conviction without reaching the merits of the petitioner's claim. In so doing the Court held that any error in the admission of the challenged confession was harmless error beyond a reasonable doubt. The reason the Court held the admission of the question confession to be harmless error was that 1) the State had abundant evidence to convict the Defendant of the charge absent any admissions by the Defendant; 2) the State had a taped confession by the Defendant which was not challenged by the Defendant; 3) the State had two signed confessions which also were not subject to challenge on constitutional grounds; and 4) the State had admittedly proper testimony concerning oral admissions made by the Defendant upon being returned to the scene of the crime.

In the case sub judice the State's evidence consisted of three elements.

1. The Defendant's statement to Detective Dufore.
2. The Defendant's statements to his girlfriend, Zelma Hurley.
3. Certain items of circumstantial evidence tending to link the Defendant to the crime.

Apart from the Defendant's statement to Detective Dufore, therefore, the bulk of the State's case consisted of the incriminating statements allegedly made by the Defendant to Zelma Hurley. In addition,much of the circumstantial evidence presented by the State was linked up to the Defendant through the testimony of Zelma Hurley.

It was Zelma Hurley who claimed the Defendant had in his possession rings and jewelry which were described as similar to those owned by Lynn Hermann. It was Zelma Hurley who stated that the Defendant told her he could not shoot the victims as that would have made to much noise (and thereby laid the predicate for introduction of evidence that the Defendant had owned a gun which he sold the day after the murders were committed). It was Zelma Hurley who produced a piece of cord , similar in type to that used to strangle the murder victims, from a dresser drawer in the apartment she and the Defendant had shared. Zelma

Hurley also produced at that same time a shirt with blood on it which she claimd the Petitioner had put on the roof of the apartment building the day they left for Pennsylvania. (The State, however, was unable to produce evidence linking up the blood on the shirt either to the bictims or the Petiioner, and, in fact, could not even identify the blood as humand blood. The testimony as to the piece of cord was that it was of the same type of cord used in the murders but not necessarily from the same production run).

Without the tesimony of Detective Dufore, therefore, the credibility of Zelma Hurley's testimony would be of overwhelming importance in evaluating the strength of the State's case against the Petitioner and Zelma Hurley was a person singularly lacking in credibility.

According to Zelma Hurley, after the Petitioner had told her about the murders, she left with the Petitioner and her eight year old son to visit her sister in Pennsylvania (R-793). She stayed with her sister for a week and then flew back to Tampa. During the week she was visiting with her sister, she told no one, not even her twin sister, that the Petitioner had admitted committing a triple murder to her, even though she said that she had believed him (R-775) and feared for the safety of herself, her son (R-769, 770), and her sister's family (R-776,777) and that she could have safely told the police what the Petitioner had related to her. At the end of a week, Zelma Hurley flew back to Tampa for undisclosed reasons, at that time leaving her young son in the custody of a man that she claims had admitted just having killed three people (R-

After arriving in Tampa, Zelma Hurley went to see Frankie Dalia, a man who had supplied her with illegal drugs (R-795), and Frankie Dalia told her that the detectives had questioned him about the murders (R-795). It was at this point that Zelma Hurley decided to contact the police and tell them what the Petitioner had told her. When Zelma Hurley finally contacted the police, a week after the murders took place she gave the police detectives and the prosecutor a sworn statement concerning her knowledge of the murders. This statement was a lie and constituted perjury on her part (R-783). At that point, the prosecutor threatened to charge her with being an accessory after the fact of murder and with perjury unless she changed her story (R-784), and Zelma Hurley then gave the prosecutor a second sworn statement which was substantially different from the first statement she gave them (R-784,787). At trial, Zelma Hurley again changed her story adding additional details to her story which she had previously denied in both her earlier statements (R-800).

At trial, Zelma Hurley stated that the Petitioner told her about the murders during the car ride to Pennsylvania. She admitted on cross-examination, however, that she was taking amphetamines during the trip (R-794,797) (to stay awake-although she wasn't doing the driving), that her son who was in the back seat did not hear any of this conversation (R-770). She was very vague in her description of the watch the Petitioner had shown her (R-772,773), expressed a decided lack of interest in the watch, even though she had allegedly been told where it had come from, and staced that her mind "wasn't in to good a shape" (R-773). In addition, Zelma Hurley stated that they slept in the car in a motel parking lot (R-771) even though she claimed to have seen a large amount of money in the Petitioner's possession (R-750) just before they left for Pennsylvania.

If the testimony of Detecitve Dufore, concerning the statements the Petitioner had made to him, had not been admitted in evidence, the case against the Petitioner would have rested entirely upon the credibility of Zelma Hurley. Without her testimony, there would have been no case against the Petitioner. Zelma Hurley's testimony, however, was highly suspect. In light of this fact, the admission of Detective Dufore's testimony, therefore, had the effect of supporting and lending credence to Zelma Hurley's testimony. Under these circumstances it cannot be said that the admission of Detective

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Dufore's statement was, beyond a reasonable doubt, not prejudicial.

The admission of the rapist remark, in turn, virtually forced the Petitioner to take the stand. Whatever option the Petitioner might have had before the 'rapist' remark was admitted, after it was admitted, he had no practical alternative but to take the stand and explain the context in which the remark had been made. Even thn, however, the State was able to utilize the Petitioner's response to support Zelma Hurley's testimony by linking the suggestion that the Petitioner had a propensity to commit rape with the suggestion that Lynn Hermann might have been raped. (It was never proven that Lynn Hermann had been forceably raped, or that she had had intercourse at or about the time she was killed.) at the very least, the introduction of the 'rapist' remark exercised an unconstitutionally chilling effect on the Petitioner's decision whether to take the stand. Brooks v. Tennessee 92 S. Ct. 1891 (1972)

The State, however asserts that even if Detective Dufore's testimony had not been admitted in evidence in the State's direct case, the substance of the remark would have been admitted in rebuttal by virtue of this Court's ruling in Harris v. New York 401 U.S. 222 (1971). This, however, is simply not so for two reasons.

First. The Petitioner might well have decided not to take the stand, if Detective Dufore's testimony had not been before the jury. In this event there would be no rebuttal testimony at all.

Second. If the Petitioner had taken the stand the State could only have used the 'rapist' remark to impeach the testimony given by the Petitioner. Since the State had not established that Lynn Hermann had been raped, however, the State could not have queried the Petitioner as to whether he was a'rapist' remark for impeachment purposes if he denied it. Even if the State had produced evidence that Lynn Hermann had been raped at or near the time she was killed, however, the 'rapist' remark could not have been used by the State, since such an admission, standing alone, would only have tended to show a mere propensity on the Petitioner's part to commit such an act, and under Florida law would have been inadmissable as evidence under the 'similar fact rule'. Williams v. State (Fla. 1959) 110 So. 2d. 654, certiorari denied 80 S. Ct. 102; Green v. State (Fla. App. 1966) 190 So. 2d. 42.

## Conclusion

For the reasons expressed above and based on the authorities cited herein, the Petitioner would respectfully request this Court to reconsider this cause and grant the Writ of Certiorari to the Supreme Court of Florida to review the Petitioner's conviction and sentence.

Richard W. Seymour
Attorney for Petitioner

## CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the gounds specified in Rule 58 (2).

Richard W. Seymour
Counsel for Petitioner

July 30, 1976.

# REPLY BRIEF

ORIGINAL (4)

CASE NO. 83-6807



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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GARY ELDON ALVORD,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# PETITIONER'S REPLY BRIEF

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ATTORNEY FOR PETITIONER

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I.

IN DECIDING THAT COUNSEL IS RELIEVED OF HIS DUTY TO INVESTIGATE AND COUNSEL AN INSANITY DEFENSE BY THE PRE-INVESTIGATION OBJECTIONS OF HIS CLIENT, THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN AND OF THE FOURTH CIRCUIT COURT OF APPEALS ON AN IMPORTANT QUESTION OF THE ATTORNEY-CLIENT RELATIONSHIP

Respondent contends that because the Fourth Circuit Court of Appeals decision in Brennan v. Blankenship, 472 F.Supp. 149 (W.D. Va. 1979), aff'd mem. 624 F.2d 1093 (4th Cir. 1983), is a memorandum affirmance of the district court decision, "it provides a wholly inadequate basis upon which to establish a conflict of decisions." In Ivan Allen Company v. United States, 422 U.S. 617 (1975), this Court found that conflict with a district court decision affirmed by a memorandum decision formed a perfectly sufficient basis for a grant of certiorari. 422 U.S. at 623-24.

Respondent's argument that the decision of the Eleventh Circuit panel below is consistent with Strickland v. Washington, ____U.S.____, 52 U.S.L.W. 4565 (1984) is an inappropriate response to the Petition for Writ of Certiorari in this case. Although Strickland v. Washington is a fundamental decision in this area, the question petitioner requests this Court to address was not at issue there. In Strickland, this Court set forth standards for judging a habeas claim of ineffective counsel in a capital case, and then applied those standards to the facts of the case. The facts of Strickland did not require this Court to determine whether an attorney is relieved of his responsiblity to investigate and counsel the single plausible defense in a capital case by the pre-investigation objections of his presumptively-insane client. Insanity was not an issue. The relative responsibilities of counsel and client in directing the investigation of the defense was not questioned in that



decision. Thus, whether the decision below is consistent with Strickland v. Washington has little to do with whether it conflicts with Brennan and Jones v. Barnes, 463 U.S. ____, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Respondent incorrectly terms the issue here as whether the failure of counsel to prepare and present an insanity defense constitutes ineffective assistance. Petitioner does not contend here that an insanity defense should have been imposed. The issue is whether, under the facts here, the sole viable defense should have been fully investigated and strongly counseled. Respondent's characterization of the issue is imprecise, unwarranted, and lends confusion to the matter.

Respondent argues that Brennan is factually inapposite because there the defendant's "faculties were so impaired that he could not make an informed choice", whereas Alvord had been adjudged competent to stand trial. First, it should be noted that in Brennan, two of three examining psychiatrists found the defendant competent. 472 F.Supp. at 150. Second, legal competency is not synonymous with full rationality. It cannot be disputed that Alvord is a lifelong schizophrenic. The district court termed petitioner "obviously unstable". Alvord v. Wainwright, 564 F.Supp. 459, 473 (M.D. Fla. 1983). Additionally, petitioner was kept under suicide watch while awaiting trial because it was felt he might destroy himself. Thus, he was not to be trusted with clothes or a blanket, but was to be trusted with unqualified control of his own defense in a capital case. The distinction between this case and Brennan is difficult to discern.

Respondent claims that Jones v. Barnes does not conflict because here counsel's actions were a reasonable exercise of his professional judgment. Of course, the reasonableness of counsel's

actions is the ultimate question in this case, and may not be assumed in arguing against a grant of a Writ of Certiorari.

II.

THE CIRCUIT COURTS OF APPEAL ARE IN DIRECT CONFLICT ON THE ISSUE OF THE ALLOCATION OF THE BURDEN OF PROOF OF WAIVER VEL NON OF A MIRANDA RIGHT WHEN THE RECORD IS SILENT

Respondent argues that the Eleventh Circuit panel below did not erroneously shift the burden of proof on the issue of petitioner's waiver of his right to appointed counsel. The essence of respondent's contention is that the record is not silent on the issue, and thus the burden properly falls on the petitioner to demonstrate a lack of waiver. Respondent is unable to provide any authority to support the panel's conclusion that the requirements of Miranda 1/ are met by a general statement by the interrogating officer that he gave Alvord the proper warnings, or that the officer's "shorthand" reference to Alvord's right to counsel includes the right to appointed counsel. The applicable case law is uniformly to the contrary, and thus the respondent's argument that the record is not silent must be rejected. 2/

Petitioner has previously cited Clark v. Smith, 403 U.S. 946 (1971)(per curiam), reversing 224 Ga. 766, 164 S.E. 2d 790 (1968), reversed on remand, 228 Ga. 205, 184 S.E. 2d 822 (1971) in support of his position. The Miranda opinion itself points out the

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1/ Miranda v. Arizona, 384 U.S. 436 (1966).

2/ Respondent asserts Alvord's Miranda claim has been before this Court in Alvord v. Florida, 428 U.S. 923 (1976). It serves the interest of clarity to note that the specific issue petitioner requests this Court to resolve is the allocation of the burden of proving, in a habeas proceeding, waiver vel non of a fundamental right in the face of a silent record. Petitioner has never raised this issue before this Court.



difference between merely informing an accused of his general right to counsel and informing him that counsel will be appointed if he cannot afford one:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent - the person most often subjected to interrogation - the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Miranda at 473. (emphasis added). Thus it is clear that, contrary to the panel's conclusion below, the interrogating officer's statement that he advised Alvord of his right to counsel did not establish for the record that Alvord was advised of his right to appointed counsel. It is even more apparent that a conclusory statement by the officer that he informed Alvord of his rights is not record evidence that he informed Alvord of his right to appointed counsel. In Molignaro v. Dutton, 373 F.2d 729 (5th Cir. 1967), a habeas case, the prosecutor, Land, submitted the following written interrogatory to dispute Molignaro's claim that he had not been advised of his right to appointed counsel:

> 3. If you were present when Henry A. Molignaro entered his plea of guilty to molesting a minor, please state whether or not Henry A. Molignaro was advised of his constitutional rights concerning the appointment of legal counsel for his defense.

A. Henry A. Molignaro was so advised.

Id. at 730. Although in Molignaro the state offered evidence that the accused was explicitly advised that counsel would be appointed, the Fifth Circuit found the mere question-and-answer failed to show Molignaro's right to counsel was made clear.

> [T]he evidence adduced on the hearing was in such form that we are unable to determine how or in what way Molignaro was advised of the right to counsel. The vice is in the conclusory form of the question followed by a like response. For the terse statement that "he was so advised" provides little insight into either the nature of, or the circumstances surrounding, the advice. In this undulating dynamic field of expanding constitutional precept, until the factual details are revealed none can know whether Judge Land's understanding of the accused's "constitutional rights" matched that of the law. Nor can we tell whether that "understanding" even if correct was adequately communicated to the non-lawyer accused.

Id. at 730. (emphasis added). What is required, the court stated, are specific facts, not conclusive generalities. Id. at 731. See, also, Dulin v. Henderson, 448 F.2d 1238, 1240 (5th Cir. 1971); Craig v. Beto, 458 F.2d 1131, 1135-36 (5th Cir. 1972).

The facts of this case are well within the Molignaro rule. The evidence found wanting in Molignaro was far more specific than the general, conclusory statement relied on by the respondent here.

There is no evidence that Alvord was made aware of his right to appointed counsel. Thus the record is silent on the issue. By shifting the burden to the petitioner to deomonstrate that he did not receive proper Miranda warnings, the opinion below is in direct conflict with the decisions previously cited in the Petition for Writ of Certiorari. This Court should grant certiorari to resolve this important issues of constitutional law and habeas corpus procedure.



## CONCLUSION

For these reasons petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Circuit Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Attorney for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ann Garrison Paschall, Assistant Attorney General, and Peggy A. Quince, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida, 33602, this 30 day of July, 1984.

Attorney for Petitioner

# OPINION

# SUPREME COURT OF THE UNITED STATES

GARY ELDON ALVORD *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-6807. Decided October 29, 1984

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This petition asks us to consider whether an attorney renders effective assistance of counsel when he forgoes all investigation into his client's only plausible line of defense and defers to his client's wishes on defense strategy, without any regard for the client's knowledge of, or ability to understand, the law, the facts, or the ramifications of the decision.

The question could scarcely be more starkly posed. The petitioner here had previously been adjudicated insane at a criminal trial, and his reasoning faculties were therefore highly suspect. Yet appointed counsel accepted his client's initial refusal to rely on the insanity defense, made no independent investigation of his client's mental or criminal history, learned no facts that would enable him to persuade his client to change his mind, and instead permitted his client to rely on an unsupported alibi that all acknowledged to have been, at best, weak. The lower court approved this course of conduct on the ground that the client was found competent to stand trial and therefore was entitled to have his wishes followed. Because I believe the lower court decision seriously misconstrues the constitutional role of a criminal defense lawyer, I would grant certiorari to review the decision.

9pp

I

The record demonstrates unequivocally that Gary Alvord has a long history of mental illness. He first entered a mental hospital at age 13. In 1967, he was charged in Michigan with rape and murder; he spent two years in a mental hospital and was then declared competent to stand trial. At a bench trial, he was found not guilty by reason of insanity and was committed to the custody of the Michigan Department of Mental Health. After escaping from the Ionia State Hospital in Michigan, he traveled to Florida, where he committed the three murders for which he received the death sentence in Florida.

Counsel, a part-time public defender, was appointed to represent Alvord after his indictment in 1973. Alvord refused to talk to the lawyer; instead, it was the prosecutor who told counsel that Alvord had been adjudicated not guilty by reason of insanity in Michigan. Counsel moved for a mental examination, and two psychiatrists were directed to conduct the examination. Ultimately, the trial judge ruled that Alvord was competent to stand trial.[1]

Appointed counsel saw Alvord for about 15 minutes after Alvord was indicted. Counsel's subsequent pretrial contact with his client was primarily at court hearings. According to the Court of Appeals, Alvord's counsel conducted no independent investigation into Alvord's history of mental illness. He did not contact doctors, other than one brought in by the State to interview Alvord, see n. 1, *supra*, at the Michigan hospital where Alvord had spent considerable time, and he

[1] Alvord declined to talk to the two psychiatrists unless his lawyer was present. His lawyer did not attend the meetings, and the psychiatrists were unable to give an opinion on his mental state. Thereafter, the State brought in one of the psychiatrists who had known Alvord in Michigan. Alvord spoke with him, and the psychiatrist concluded that Alvord was competent to stand trial. The two other psychiatrists then sought to interview Alvord again. One of them concluded that he was competent to stand trial. The other declined to draw a conclusion. The trial judge then determined that Alvord was competent to stand trial.



only obtained a small portion of Alvord's medical record. He made no effort to have that portion of the medical record examined and interpreted by a psychiatrist. He did not offer to the court any document or testimony indicating that Alvord had previously been adjudicated incompetent, even after the trial judge observed that no such evidence was presented. *Nor did he raise at trial the presumption of insanity afforded Alvord under Florida law, because of his prior adjudication of insanity, the effect of which would have been to place the burden of proof on the prosecution to prove sanity beyond a reasonable doubt.*[2] Nor, apparently, did counsel even inform Alvord of this legal principle and its potential consequences. Finally, counsel apparently did not contact the attorney who represented Alvord during the Michigan prosecution, who would have told him that Alvord initially had been disinclined to assist in his best defense there as well, until he had come to trust counsel.[3] "In short, [counsel] undertook virtually no investigation of the one defense [counsel himself] considered viable in Alvord's case, choosing

[2] See *Livingston* v. *State*, 383 So. 2d 947 (Fla. App. 1980) (Florida presumes insanity, once one has been adjudged insane, until is it shown that sanity has returned); *Hixon* v. *State*, 165 So. 2d 436, 439 (Fl. App. 1964) (reversing conviction for failure of prosecutor to overcome defendant's presumption of insanity, which had been established in a prior Ohio adjudication).

[3] At the federal habeas hearing, one of Alvord's Michigan psychiatrists testified:

"Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. *But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.*" Pet. for Cert. 14 (emphasis added).

instead to comply with Alvord's request that he put petitioner on the stand and proceed with an alibi defense." 564 F. Supp. 459, 471 (MD Fla. 1983). The lower court opinions and findings establish that counsel made absolutely no effort to pursue the possibility of an insanity defense, after his unstable client's uneducated objection to the possibility, but instead unquestioningly accepted his client's direction to pursue a frivolous alibi defense.

The federal habeas court rejected Alvord's claim on the ground that counsel acted reasonably in deciding that it would be useless to pursue an insanity defense because Alvord would not cooperate. *Id.*, at 473–474. This argument wholly misses the mark. The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter. The Court of Appeals adopted the District Court's reasoning and also observed that Alvord had been found competent to stand trial—in part because counsel had failed to present to the court evidence of the prior insanity adjudication—and that counsel "was ethically bound to follow his client's wishes" as a result. 725 F. 2d 1282, 1289 (CA11 1984). This holding is the crux of the decision. With this ruling, the Eleventh Circuit has loudly and clearly signalled that counsel need not question a client's decisions on crucial trial issues as long as the client is found competent to stand trial, even if counsel's professional judgment suggests to him that an alternative decision would be in the client's best interests.

II

It is crucial to recognize precisely what is at issue here. The lower courts in this case have interpreted our decisions to hold that counsel has absolutely no obligation to investigate, at all, the only plausible defense a defendant might have, and no obligation to provide advice on that issue, once



the defendant indicates a desire not to pursue that defense, even when the client's reasoning faculties are highly suspect. The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable.

This result renders meaningless defense counsel's vital function as an adviser. Counsel must ensure that the client has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty.[4] Each of these decisions involves the waiver of a constitutional right and must be made by the accused, but

[4] The lower court ruling is therefore premised on a significant misunderstanding of the division of responsibility between counsel and client at trial, and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determinating the reasonableness of counsel's assistance. See *Strickland* v. *Washington*, 466 U. S. —— (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides:

"Standard 4–5.1. Advising the defendant

"(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

"Standard 4–5.2. Control and direction of the case

"(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

"(i) what plea to enter;

"(ii) whether to waive jury trial; and

"(iii) whether to testify in his or her own behalf.

(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards for Criminal Justice 4–5.1, 4–5.2 (2d ed. 1980 and Supp. 1982).

with the advice of counsel. Counsel's role is to provide advice that will assure not only that the waiver is voluntary and intelligent, but also that the accused is reasonably well informed. See *McMann* v. *Richardson*, 397 U. S. 759, 769–770 (1970). Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information.[5]

Of course the need for assistance of counsel extends well beyond assistance in deciding whether to waive constitutional rights. The Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938). Thus, counsel is authorized to make certain choices for his client, after consultation with the client, during which counsel, who is fully informed of the facts, discusses the options with his client. As this Court has noted, "[w]ith the exception of [the three] specified

[5]Ethical Consideration 7–7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue. The section reads in pertinent part:

"A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken."

Ethical Consideration 7–8 provides that "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." ABA/BNA Lawyers' Manual on Professional Conduct, 01:332–01:333 (1984). Under the lower court ruling, however, once a presumptively insane client has made a decision that is obviously prejudicial, the attorney has no obligation to try to persuade his client otherwise by informing him of relevant considerations.



fundamental decisions [involving waiver of constitutional rights], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Jones* v. *Barnes*, 463 U. S. ——, ——, n. 6 (1983). When counsel is obliged to make the decision himself, blind deference to a client's wishes, without any investigation, is unquestionably inappropriate and constitutionally ineffective.

Thus, regardless of whether the ultimate decision on an insanity defense is that of the attorney or his client, counsel must fully inform himself of the facts and law, make a reasonable investigation into the only plausible line of defense, and share his conclusions with his client. This is the essence of effective assistance of counsel. This conclusion, which I would have thought to have been well ingrained in our Sixth Amendment jurisprudence, is wholly at odds with the view that a lawyer reasonably may assume that his client—no matter what his training or mental capacity—has based his decision on sufficient information and knowledge as to render the lawyer's further effort unnecessary. To my mind, such total deference is only proper, if at all, when counsel has good reason to assume that his client's decisions are based on an intelligent and informed understanding of his situation.

Moreover, the analysis and result below are inconsistent not only with fundamental principles of the role of counsel, but also with a decision in another Circuit, thereby rendering this case particularly appropriate for certiorari. In contrast to the Eleventh Circuit, the Fourth Circuit has affirmed the grant of a habeas petition when counsel had totally failed to develop the only conceivable defense at the defendant's state trial, and had neglected to advise the defendant properly as to his legal alternatives. See *Brennan* v. *Blankenship*, 472 F. Supp. 149 (WD Va. 1979), aff'd, 624 F. 2d 1093 (1980). In *Brennan*, counsel had permitted himself to be guided by the defendant's aversion to insanity pleas. The court applied the "normal level of competence" test and found that under any

professional standard, it was improper for counsel to rely blindly on the statement of a criminal client whose reasoning abilities are highly suspect, and that counsel at least had a duty to investigate and try to persuade his client. As the court wrote, "[g]iven the attorneys' reasonable conclusion that there was no other factual defense or factors in mitigation, it is almost incredible that the attorneys did not press Brennan on the point." 472 F. Supp., at 156. Neither the Court of Appeals, nor any papers filed here, comes even close to distinguishing this case.

III

In this case, defense counsel avoided all responsibility to investigate his client's only plausible defense, to inform his client of the legal ramifications of an insanity plea—of which it is far from certain counsel was even aware, to assure that the decision was not based on a lack of information, to talk with psychiatrists to determine whether his client understood the ramifications of his decision, to talk with prior counsel to discover that Alvord had in the past hesitated to trust counsel until he was made to feel he was being properly represented, to consider whether the insanity defense was a strong one, or to find out that Florida law would have shifted the burden of proof on insanity because of Alvord's prior insanity adjudication. Prior to trial, he met with his client—the client who was facing trial for three capital murders—for only 15 minutes outside of court. During this time, his client was in jail, under suicide watch, with no lights in his cell, no furniture except a mattress, no blanket, and no clothing. Also during this time, Alvord refused to talk with psychiatrists unless his lawyer was present, yet his lawyer never visited him in jail, nor attended the interview sessions. It is difficult to imagine how the trial would have differed had Alvord had no counsel at all. There can be little doubt that under almost any standard other than that recognized by the



lower courts, counsel's assistance here would be considered constitutionally ineffective.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I did not so believe, I would grant certiorari in this case. The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully to assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney. To avoid that result, I would grant the petition. I dissent from the Court's refusal to do so.